

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8
9 Transcript of 104 Hearing and Motion Proceedings
10 before The Honorable James O. Browning, United States
11 District Judge, Las Cruces, Dona County,
New Mexico, commencing on April, 4, 2018.

12 For the Government: Ms. Maria Armijo; Mr. Randy
13 Castellano; Mr. Matthew Beck

14
15 For the Defendants: Mr. Brock Benjamin, Ms. Cori
16 Harbour-Valdez; Mr. Patrick Burke; Mr. Jim Castle;
17 Mr. Robert Cooper; Mr. James Lahann; Mr. Joe
Shattuck; Mr. John Granberg; Mr. Billy Blackburn; Mr.
Scott Davidson; Mr. Donovan Roberts; Ms. Lisa Torraco

18 For Fred Quintana: Mr. Phil Sapien

19 For James Garcia: Mr. Glazener

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1
2 THE COURT: All right. Let's go on the
3 record. Let's everybody grab their seats. And I
4 think every defendant has at least one attorney here.
5 So we'll get started.

6 All right. The Court will call the United
7 States of America versus Angel DeLeon, Criminal
8 Matter No. 15-CR-4268 JB.

9 If Counsel will enter their appearances.
10 Let's start with Mr. Joe Lawrence Gallegos.

11 MR. BENJAMIN: Good morning, Your Honor.
12 Brock Benjamin on behalf of Mr. Garcia.

13 THE COURT: Mr. Benjamin, good morning to
14 you. Mr. Gallegos, good morning for you.

15 THE DEFENDANT: Good morning.

16 THE COURT: And for Mr. Troup.

17 MS. HARBOUR-VALDEZ: Good morning, Your
18 Honor. Cori Harbour-Valdez and Pat Burke on behalf
19 of Edward Troup.

20 THE COURT: All right. Ms. Harbour-Valdez,
21 Mr. Burke, Mr. Troup, good morning to you.

22 THE DEFENDANT: Good morning, sir. Good
23 morning to you.

24 THE COURT: And for Mr. Billy Garcia.

25 MR. COOPER: Good morning, Your Honor. Bob

1 Cooper and Jim Castle on behalf of Mr. Garcia, who is
2 present today.

3 THE COURT: Mr. Cooper, Mr. Castle, and Mr.
4 Garcia, good morning to you.

5 MR. COOPER: Good morning.

6 THE COURT: And let's go to Mr. Shattuck.

7 MR. SHATTUCK: Good morning, Judge. Joe
8 Shattuck and Jeff Lahann for Mr. Patterson.

9 THE COURT: Mr. Shattuck, good morning to
10 you. Mr. Lahann, good morning to you. And Mr.
11 Patterson, good morning to you.

12 THE DEFENDANT: Good morning, Judge.

13 THE COURT: And for Christopher Chavez.

14 MR. GRANBERG: Good morning, Your Honor.
15 John Granberg for Christopher Chavez.

16 THE COURT: All right. Mr. Chavez,
17 Mr. Granberg, good morning to you.

18 And for Arturo Arnulfo Garcia.

19 MR. BLACKBURN: Billy Blackburn and Scott
20 Davidson on behalf of Mr. Garcia, Your Honor.

21 THE COURT: All right. Mr. Blackburn, Mr.
22 Davidson, and Mr. Garcia, good morning to you.

23 THE DEFENDANT: Good morning.

24 THE COURT: And for Andrew Gallegos?

25 MR. ROBERTS: Good morning, Your Honor.

1 Donovan Roberts and Lisa Torraco for Andrew Gallegos.

2 THE COURT: All right. Mr. Roberts,
3 Ms. Torraco, and Mr. Gallegos, good morning to you.

4 THE DEFENDANT: Good morning.

5 And then for the Government. I should have
6 started there.

7 MS. ARMIJO: Good morning, Your Honor.
8 Maria Armijo, Randy Castellano, and Matthew Beck on
9 behalf of the United States.

10 THE COURT: All right. Ms. Armijo, Mr.
11 Castellano, and Mr. Beck, good morning to you.

12 The first thing I want to do is me come off
13 the bench, and the attorneys come over here with
14 me -- the defense lawyers -- and I'm going to decide
15 and take a look at this arrangement. Mr. Roberts had
16 some concerns when he came in on the other trial. I
17 think that all the defense lawyers on the first
18 trial, they took a look at what Mr. Roberts was
19 looking at. When the defense lawyers came in, their
20 defendants didn't see any of the things that
21 Mr. Roberts saw. So I welcome the defense lawyers to
22 sit here in the jury box, and let's take a look. We
23 have not used the white before, so the white is
24 different. And I just want to make sure that the
25 light doesn't pick up anything.

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1 MR. ROBERTS: Could I ask that the screen
2 be turned on.

3 THE COURT: Are you able to do that?

4 THE CLERK: I'll have to figure out how.

5 THE COURT: Let's see if the jury -- all
6 right. Mr. Troup, why don't you stand up. So
7 anybody seeing anything there? I'm not seeing
8 anything. Good. Y'all are welcome to look here,
9 too. This wasn't in the first trial, and I was
10 disappointed that it was not in the first trial, but
11 it is in the second trial, and we intend to leave it
12 there throughout the trial or, certainly through voir
13 dire, so we don't have any -- Mr. Garcia, do you want
14 to stand up. Anybody see anything?

15 MR. ROBERTS: No.

16 MR. CASTLE: Just his pretty face.

17 THE COURT: The white doesn't seem to do
18 any different than the black. Anybody else want to
19 stand up? Just call out your client's name if you
20 want them to stand up and look. Anybody want to take
21 a different angle? Anybody want to see?

22 All right. Now, gentlemen, we're going to
23 great lengths. You know, nothing is perfect in this
24 world. We're going to great lengths to make sure the
25 jury does not see your shackles on your feet. You're

1 not going to be handcuffed during the trial, so
2 they're not going to see handcuffs. And your counsel
3 are really going to dress you up, so you're going to
4 look pretty good. Don't do anything to show them the
5 ankle restraints. I don't want them to see them. I
6 don't think you want them to see them, and your
7 counsel doesn't want them to see them.

8 So if something happens, don't move. We'll
9 get the jury out of here, I'll get the jury out of
10 here, and then you can move. If something comes up,
11 don't move, and stay behind there, and don't do
12 anything to, you know, show those leg restraints,
13 okay? Because we're working real hard to make sure
14 that you get a fair trial and they don't see those
15 leg restraints and don't start thinking about them
16 and don't start dwelling on them in any way. So help
17 me out, because we're going to do everything we can
18 to make sure the jury never thinks about you men
19 being in custody or restraints or anything like that.
20 So we don't want them to be thinking about that.

21 We want them to be thinking about the
22 evidence. We want them to be thinking about the
23 arguments. And that's all we want them to be
24 thinking about. So really work with us to try to
25 make sure that they just don't see those leg

1 restraints. If somebody has got to move, don't move,
2 let your counsel say, "Judge," something. And the
3 lawyers, they've been through this, they'll help me
4 and they'll help you.

5 All right. Anything anybody else wants to
6 say or do as far as just seeing the restraints?

7 All right. Let's everybody take our seats
8 then.

9 All right. Now, I've got a stack of
10 motions that I know we've got to get through. And
11 Ms. Wild and other people have tagged to these
12 motions that: This has got to be argued first; this
13 has got to be argued first. Well, I can only argue
14 one thing first, I can't argue them all.

15 The thing I have up for argument first,
16 just as far as batting order, is continuing with
17 these bad acts. But if y'all have -- I think
18 Mr. Billy Garcia's bad acts are up first. But if
19 y'all do have something you want to argue first, and
20 everybody is in agreement with it, then I'm willing
21 to go there. Or we can just start plowing through
22 the bad acts.

23 Mr. Davidson?

24 MR. DAVIDSON: If we could address my
25 motion to continue?

1 THE COURT: All right. Let me talk to
2 everybody here. Mr. Davidson has filed a
3 supplemental motion. I think everybody has seen his
4 motion that he filed on March 22. He filed yesterday
5 or the day before yesterday a supplemental motion
6 that I think only the Government and the Court, and
7 that's it -- he filed so that only those parties
8 could see. I guess the question is: Does anybody
9 have any problem with me seeing this, given that
10 other people are not seeing it? Does anybody have
11 any objection to me seeing it but the other defense
12 lawyers and defendants not seeing it?

13 MR. DAVIDSON: No, Your Honor.

14 THE COURT: Not hearing any objection, then
15 how do you wish to proceed, Mr. Davidson?

16 MR. DAVIDSON: Well, Your Honor, I just
17 want to clarify. I don't think the Government saw
18 it.

19 THE COURT: So the Government didn't see
20 it. Do you have any problem then with me seeing it
21 and the Government not seeing it?

22 MS. ARMIJO: No, Your Honor, we don't need
23 to see it. I believe, in general, he has spoken to
24 us about it.

25 THE COURT: Okay. All right. So then how

1 do you want to the proceed, Mr. Davidson?

2 MR. DAVIDSON: I'd like to address the
3 Court.

4 THE COURT: Okay. Mr. Davidson, I think
5 everybody expresses their thoughts to you, and we're
6 sorry you and your family are having to go through
7 this. So it's tough. And I send you and your family
8 and your wife our thoughts as y'all go through this.

9 Mr. Davidson.

10 MR. DAVIDSON: I appreciate that, Your
11 Honor. I don't need to, I think, restate the facts.
12 But, essentially, the bottom line is for the last
13 several months, I have not been able to be a fully
14 effective member of the defense team for my client.
15 And my wife's recovery is ongoing, and there are
16 anticipated to be additional treatments that are
17 going to require me to be in Albuquerque during the
18 pendency of the trial. And for these reasons, I feel
19 it's necessary for me to withdraw as co-counsel for
20 Mr. Garcia. And then I would ask that the Court
21 appoint replacement counsel to assist Mr. Blackburn
22 in representing Mr. Garcia in this case.

23 The second and third related forms of
24 relief requested in the motion are to sever
25 Mr. Garcia from the trial beginning on April 9, on

1 Monday, and continue that to a later date, at which
2 point an effective team of two lawyers for Mr. Garcia
3 can be assembled, basically replacement counsel found
4 for me to assist Mr. Blackburn representing
5 Mr. Garcia, and continue that to a later date.

6 Alternatively, the Court could sever out
7 Count 3, which would include Mr. Troup and
8 Mr. Garcia, from the trial proceeding on Monday.

9 Those are the forms of relief that we're
10 requesting.

11 The motion to withdraw is unopposed by all
12 parties.

13 The motion to sever and continue, when I
14 sought the Government's position, the Government was
15 opposed to severing and continuing Mr. Garcia's
16 portion of the trial. I'm not sure if the
17 Government's position on that has changed.

18 THE COURT: All right. I have some
19 questions. But I may ask some of those questions up
20 here at the bench here in a moment.

21 Mr. Blackburn, do you want to address this
22 situation?

23 MR. BLACKBURN: Sure, Your Honor. I don't
24 think there is anyone in the courtroom that doesn't
25 understand or have their thoughts for great recovery

1 for Mr. Davidson for his wife. Those of us who know
2 her personally, it's heartbreaking for all of us. As
3 the Court knows, Mr. Davidson is in my office with
4 Mr. Cooper. So we see Scott and his wife Jenny all
5 the time, and their kids. So it's been pretty
6 nerve-racking around our office. But as the Court
7 says, and I think everybody agrees, that we wish them
8 all the best recovery.

9 I can only relate to state a couple of
10 things in support thereof. I think it's important
11 for Mr. Davidson to withdraw from the case. I mean,
12 seeing him at the office and watching what is going
13 on -- just last week, he had an all-day appointment
14 with his wife. And I needed to talk to him about
15 issues, and went down about 9:00 in the morning, and
16 they told me he wouldn't be back until 3:00 that
17 afternoon because of the number of medical
18 appointments she had. And when I went down to talk
19 to him that afternoon, I might as well have been
20 talking to the wall, because, you know, it was
21 obvious that his concentration was not with what I
22 was trying to ask him about -- certain things that
23 relate to this particular trial, and just in life in
24 general, because of the all-day procedures that he
25 had gone through with his wife. So, obviously, that

1 has made it very difficult for us.

2 I know that Arturo Garcia has sent his best
3 wishes to Mr. Davidson. He doesn't want -- I don't
4 think anybody wants Mr. Davidson to have to be
5 worried about a trial while this is going on.

6 The recovery is going to be long. I mean,
7 I went through this last year with my elderly mother
8 who was in the hospital for quite some time with
9 colon cancer, so I sort of know what he's going
10 through under the circumstances. You just have a
11 blank mind.

12 The problem exists, though, as it relates
13 to having a second part of the team. And
14 Mr. Davidson has been with us for 16 months. I don't
15 think there is anybody in the courtroom that has --
16 at least on the defense side -- that could say that
17 under the circumstances, that if you lose an integral
18 part of your defense team so late in the game, that
19 the one standing person left could effectively go
20 forward.

21 Just in the last month, since
22 Mr. Davidson -- or the last three weeks -- since
23 Mr. Davidson made his decision, there is not enough
24 hours in the day for me and my staff to try and
25 handle all of this.

1 I can speak for Mr. Garcia, and
2 Mr. Garcia's position is -- and he's told me this
3 several times -- that he wants somebody who is going
4 to be here and he wants somebody who is going to be
5 effective and he wants somebody to help. And we have
6 thought about alternatives. I think, with all due
7 respect, I think the only alternative is to -- the
8 only alternative, in my opinion, is to let
9 Mr. Davidson withdraw, and then sever us out, and
10 go -- either stick us with the case that's going in
11 July; somehow put that in the 1613 case. Or do
12 something that would be able to -- if Mr. Davidson is
13 going to remain out, to stay out, and to get somebody
14 to be able to be involved in both of those cases.

15 I don't know if the Court wants to actually
16 talk to Mr. Garcia. But I just express those things
17 to you.

18 And, of course, my position is, just like
19 anybody else under the circumstances, it's just
20 practically impossible. I would probably go around
21 the room and ask every one of these defense attorneys
22 here, number one, if they thought that they could be
23 effectively going to trial on an eight-week trial,
24 knowing that the person is looking at life
25 imprisonment, with just one person. I think that in

1 the motion -- and actually in the supplemental
2 motion, we sort of laid out divisions of labor, and
3 who was going to do what. And now, that's all going
4 to change. It's going to be impossible. I know if
5 there was some type of alternative that Mr. Davidson
6 would come down one day a week, or that maybe he
7 would be in Albuquerque to work on stuff. That's
8 just not going to work. If I have to cross-examine
9 every witness that comes in here, the ability for me
10 to walk over and -- walk over and ask Mr. Lahann,
11 Hey, did I miss anything? Can you tell me -- on this
12 cross-examination, can you tell me what I missed?
13 And Mr. Lahann doesn't know my case. And he's going
14 to say -- he's not going to be able to help me. You
15 know, none of the teams -- I mean, Mr. Castle and Mr.
16 Cooper, who have prepared a lot for their case and
17 knows a lot of facts as it relates to them, they're
18 not familiar with my case. They may be familiar with
19 the enterprise, but they're not familiar with my
20 case. So I can't walk over and ask Mr. Castle, say,
21 Hey, what did I miss? You know, help me out here.

22 And there is no way that Mr. Davidson could
23 do that if he was in Albuquerque or participate under
24 those circumstances.

25 So I think the Court knows where we're

1 coming from. I mean, I don't think there is going to
2 be any prejudice, if we somehow figure out how this
3 is moved down the road, so that we can try this
4 somehow or have somebody else come in and help under
5 the circumstances, whether we figure out a second
6 trial, or if there has got to be one trial just for
7 them that's put down the road at some point in time,
8 when -- the Court is worried about its schedule, the
9 Court could always give that to a visiting judge or
10 something along those circumstances.

11 There is another issue that has just
12 arisen, that I think at some point in time we need to
13 address, that relates to this whole separate issue.
14 And I just want to throw that out to the Court to
15 think that we're just not -- I don't want to be in
16 the position that the Court doesn't think that we're
17 not bringing everything forth at the time that we
18 can. Or, in the alternative, that something is being
19 held back.

20 But I think that's point one, is where
21 we're at now. I think the second thing that at least
22 I need to tell the Court now about, and we can
23 discuss that after the Court talks to us about this
24 particular motion, is that the Government has
25 indicted James Daffy Garcia. And as I understand

1 now, Mr. Garcia has agreed to cooperate and will
2 testify for the Government. In 1994, I represented
3 Mr. Garcia in a murder case in Albuquerque. I was
4 his attorney. The case went to trial in 1996. It
5 involves a gang matter, of which wasn't SNM, but for
6 which he went to prison on. So that's a separate
7 issue, but I think the Court needs to be aware of
8 that while we're discussing these issues with
9 Mr. Davidson.

10 If the Court has any questions for me, I'm
11 more than happy to address those at this point in
12 time.

13 THE COURT: Well, let me get everybody's
14 position, then I may talk to some of you up here at
15 the bench about some questions. Thank you, Mr.
16 Blackburn.

17 MR. BLACKBURN: Right. And you know, and
18 Judge, in preparation for this this morning, I came
19 up with 100 scenarios as to what would happen. Just
20 small little scenarios of just having one person
21 here. And will just share a couple of them with the
22 Court while I'm here. Last week, or when we were
23 down here two weeks ago, you know, I've known Mr.
24 Cooper for -- since we were in law school together.
25 And there is only one person I know that's had more

1 kidney stones in his life than him, and that's me.
2 So a couple of weeks ago, when we were here he turned
3 18 shades of white, and was running around this
4 courtroom like a chicken with his head cut off, and
5 grabbing his back because -- and I knew exactly what
6 was going on, because being in the same office as
7 him, he had kidney stones like two weeks prior. I
8 didn't see him for two or three days. So we sent him
9 back to the hotel; would check on him occasionally.
10 And, of course, that's what happened, he had kidney
11 stones, so he had to leave the courtroom.

12 So at this point in time, I was already
13 aware that Mr. Davidson was working on the motion to
14 withdraw at that point in time, and I'm sitting there
15 thinking, like, okay, what am I going to do under
16 these circumstances, if I'm here by myself? It would
17 disrupt proceedings. All sorts of things can happen
18 that would relate under those circumstances. I'm not
19 saying that I'm going to get kidney stones under any
20 circumstance because that's the last thing that
21 anybody ever wants to have happen, for those who have
22 had kidney stones in their life. But that was just a
23 thought process that came in.

24 And as I said, I have several scenarios,
25 and another issue that if we need to talk about at

1 the bench with the Court under those circumstances.
2 But I was just trying to figure out how disadvantaged
3 I would be by not having Mr. Davidson here. And it
4 would be impossible to have -- for us -- I called --
5 I'm sorry I forgot to mention this. I called Steve
6 McCue as soon as this happened, and talked with him
7 about finding me -- one, discussing with him: Can
8 you find me somebody who can help, and can you find
9 somebody who you think would be willing to sacrifice
10 eight weeks of their life to come down here at this
11 point in time to do this case. And he said that they
12 were tapped out completely on anybody that had the
13 experience necessary to do that. And that he just
14 thought at that point in time it would be futile. To
15 just have somebody that is not familiar with this
16 case, or just to have somebody who is not on the
17 complex panel to come in at this point in time to sit
18 here through trial, I think would be even far more of
19 a problem. I, personally, do not have time to
20 baby-sit anybody now -- not baby-sit, but to be able
21 to have -- to talk to somebody about how they need to
22 get prepared for trial, by just getting prepared for
23 trial myself.

24 So I think that was an issue, so, again, I
25 don't have any further comments at this point in

1 time, unless the Court wants to hear something else
2 from us.

3 THE COURT: I may here up at the bench.
4 Thank you, Mr. Blackburn.

5 How about any of the other defendants?
6 Anybody else want to speak on this issue here at the
7 bench?

8 THE COURT: Yes. Mr. Burke.

9 MR. BURKE: Your Honor, it really is
10 unfortunate that this is coming up now. But Mr.
11 Blackburn's conflict is far more serious and severe
12 than Michael Davis' was. So I'm not sure how to
13 handle it. But one way would be to strike Daffy --
14 James Daffy Garcia as a witness, and then that would
15 resolve the conflict issue.

16 And I suppose another way would be to sever
17 Count 3 altogether. I'm not sure -- ultimately, it
18 would end up with more trials, because Arturo Garcia
19 is facing a trial, 1613, and Edward Troup would still
20 be going to trial here. I kind of doubt the
21 Government, if they achieve a conviction on Mr. Troup
22 in this trial, would need to try him again on Count 3
23 down the road. So, as a practical matter, severing
24 Count 3 or striking Daffy Garcia as a witness would
25 solve the problem.

1 Thank you, Your Honor.

2 THE COURT: All right. Thank you, Mr.
3 Burke.

4 Any other defendant want to speak on it?

5 All right. Ms. Armijo? Mr. Castellano?
6 Thoughts on this?

7 MS. ARMIJO: And, Your Honor, we're
8 strictly dealing right now with the issue of
9 Mr. Davidson; correct?

10 THE COURT: Yes. I mean, people are
11 beginning to raise other issues, but I've got to deal
12 with that motion. So that's the one I'm focusing on
13 right at the moment.

14 MS. ARMIJO: As far as that, you know, we
15 certainly understand the issue here. We will point
16 out that Mr. Blackburn is learned counsel on this
17 case, and that he has been on this case since, I
18 think, I believe, at the beginning of this case. And
19 so, you know, despite the luxury of all of these
20 people having two attorneys, he certainly can handle
21 this case as far as Mr. Blackburn, as far as one
22 attorney.

23 But that being said, I think that the issue
24 that needs to be resolved first is probably Mr.
25 Blackburn's issue. Because that may change the

1 course of how the Court is going to deal with
2 Mr. Davidson. So, in our opinion, we think that Mr.
3 Blackburn's issue is probably the most important one
4 to be dealt with.

5 THE COURT: Well, I know nothing about it.
6 So if the Government is going to disqualify Mr.
7 Blackburn, then, you know, it probably needs to move
8 and educate the Court about whether he represented
9 him on a similar interest.

10 MS. ARMIJO: Your Honor, this matter
11 initially came up, I believe, during the December
12 hearings. And Mr. Blackburn certainly has been aware
13 of it for a number of years, since he represented
14 Mr. Garcia.

15 THE COURT: Sounds like the Government has
16 been aware of it, too.

17 MS. ARMIJO: The Government was aware of
18 it.

19 THE COURT: And y'all haven't filed a
20 motion to date, so are you filing a motion to
21 disqualify him on the eve of trial?

22 MS. ARMIJO: We will file a motion today,
23 Your Honor.

24 What has happened is, Mr. Garcia --

25 THE COURT: Are you moving to disqualify

1 him?

2 MS. ARMIJO: We will raise the conflict for
3 the Court to --

4 THE COURT: You know, you've got to get off
5 the edge of the fence. You've got to start telling
6 the Court what you think about these instead of just
7 throwing your problem after every problem in front of
8 the Court. You've had discovery problems, you've had
9 attorneys problems. You just literally throw them in
10 the lap of the Court. And you've got to start making
11 some decisions. So make it today, and tell the Court
12 whether you want him disqualified or not.

13 MS. ARMIJO: We feel that he has a
14 conflict, Your Honor. The issue is -- and the reason
15 I say we're leaving it to the Court, is because we
16 felt that Marc Lowery had a conflict.

17 THE COURT: You're not going to do what the
18 Court asked you to do?

19 MS. ARMIJO: No, we are. We feel that he
20 has a conflict and we feel that he should be
21 disqualified.

22 THE COURT: You do?

23 MS. ARMIJO: We feel that it is of a
24 nature -- we feel he should be disqualified unless
25 the Court makes a finding that the murder that he

1 represented him is not going to be admitted into
2 evidence. And that's why I say it's a little bit
3 more complex than that. But his murder from 1990 --

4 THE COURT: Why didn't you raise this issue
5 earlier? If you've known about it since December,
6 why didn't you raise it earlier?

7 MS. ARMIJO: I believe we actually raised
8 it orally before the Court. But Mr. Garcia was not
9 Government friendly recently, and so it wasn't as
10 pressing, because we didn't believe he was going to
11 be talking to the Government. He had not been -- as
12 the Court saw when he came, he was not exactly a
13 friend of the Government previously, when he was
14 contacted by the FBI. Although we had statements
15 from him, I believe that when they had last contacted
16 him, he was not inclined to come forward to the
17 Government.

18 And then we started the trial, as you know,
19 a few weeks ago, when he was brought before the Court
20 by the defense, it raised all other sorts of issues.
21 He has since been indicted. And yesterday he -- with
22 his new attorney that was familiar with criminal law,
23 sat down with the Government, and he provided a
24 statement to the Government, and is willing to
25 cooperate with the Government. So it really isn't

1 until yesterday that Mr. Garcia has decided to
2 cooperate. We anticipate him pleading guilty and
3 testifying.

4 At that point in time, I believe that Mr.
5 Blackburn -- we raised this issue again with him.
6 And he knew about the issue last week when Mr. Garcia
7 testified as well.

8 So to that extent, that is why it is now
9 ripe and in our faces, so to speak, whereas
10 previously, it was not.

11 THE COURT: Well, I'll give that some
12 thought as to whether it was any more ripe now than
13 it was in December, but -- all right. Do you have
14 anything else you want to say on Mr. Davidson's
15 motion?

16 MS. ARMIJO: On Mr. Davidson's motion?

17 THE COURT: Yeah, that's what was teed up.

18 MS. ARMIJO: No. That's why I indicated
19 that I think the other issue --

20 THE COURT: I know what you think. But do
21 you want to say anything on Mr. Davidson's motion?

22 MS. ARMIJO: No, Your Honor.

23 THE COURT: All right. Let me see
24 Mr. Davidson and Mr. Blackburn and the Government, if
25 they want to send somebody up here -- and I think

1 I'll need Mr. Garcia up here as well -- so if the
2 marshals want to bring him up here.

3 (The following proceedings were held at the
4 bench.)

5 THE COURT: I'm going to take these issues
6 one at a time, because there is enough complexity to
7 each one of the issues. So I'm going to take your
8 motion up first. I've read your motion twice. I
9 read the motion when it came in. And, of course, the
10 first thing I did is have Ms. Wild, and I think Ms.
11 Bevel as well, talk to Mr. Blackburn about the
12 situation.

13 My thoughts initially were that we could
14 get somebody to come into the case. I'd be willing
15 to go to Ms. Waters and see. I mean, we're really at
16 a luxury anyway, having two lawyers on the case.
17 That's not -- that's something I had to go to
18 Ms. Waters and see if I can get that done for the
19 defendants in this case because of some of the
20 complexity issues, because it was death penalty
21 eligible at the beginning. But there is nothing that
22 really says that each one of these men are entitled
23 to two lawyers. Some of the defendants have not had
24 two lawyers.

25 I do have the comfort that Mr. Blackburn is

1 his other lawyer and has been in front of me a number
2 of times, and is very good. Everybody in this
3 district and everybody in this courtroom knows he's
4 very good. So I think we've got some cushion there.

5 It seems to me -- and it seemed to me that
6 before I got the supplemental motion that the thing
7 maybe to do was to see if we could get Ms. Waters to
8 approve another lawyer to come into the case. If you
9 could not be in the courtroom every day, then maybe I
10 could talk to Ms. Bean, or again Ms. Waters, and see
11 if there is some feed or something that could be done
12 up into Albuquerque so that you'd be able to see the
13 trial in real-time, or at least getting some dailies.

14 My sense is Mr. Blackburn was going to
15 carry the water here in the courtroom as far as
16 cross-examination and as far as the actual trial
17 work, and that you probably were going to do most of
18 the briefing on motions and that sort of thing. I
19 think Mr. Blackburn has indicated that he was relying
20 on you because you had looked at a lot of the
21 evidence and the record, and so that he needed you
22 for that, and that he needed you to be here, not in
23 Albuquerque.

24 So I don't think Mr. Blackburn is too
25 excited about the idea that I proposed through Ms.

1 Bevel and Ms. Wild about how to deal with y'all's
2 defense team. But I guess I still think it's a bit
3 of an option to see.

4 Now, when I got your motion yesterday and I
5 read it, I then went back and reread your initial
6 motion. And I guess my concerns were that there
7 seemed to be some inconsistencies between the motion
8 itself that was filed on the 22nd, and then the
9 document that was filed on the 2nd. So I went back
10 to financial and said -- because the motion itself
11 had indicated that y'all were working vigorously,
12 tirelessly -- I have two copies here, so I don't know
13 if I'm picking up the one that relies on it -- but it
14 indicated that Mr. Blackburn, Mr. Davidson have been
15 working tirelessly for approximately 16 months.
16 Then, when I got the memorandum in support, sort of
17 indicated you hadn't worked on this case really at
18 all since January.

19 And I went down, talked to financial, and
20 sure enough, you haven't billed anything for -- since
21 late January on this. So I guess my concern is that
22 what you're telling me and what financial is telling
23 me and showing me is you haven't worked on this case
24 since January, and yet we get the motion two months
25 later in March, which seems to me to -- I mean, y'all

1 have wanted a severance all along. And by waiting
2 two months after your wife was diagnosed, and then
3 y'all went two months without you really doing any
4 work on this case, that really puts the Court in a
5 very difficult position to grant a motion, when y'all
6 have known about this for two months, and I think I
7 could have at least mitigated it, as I did with
8 Michael Davis in the first trial, and didn't. And I
9 think he got excellent representation in that trial.

10 Here, we're trying to get out of the case
11 right here before the trial starts. And it seems to
12 me it's a bit of a situation that you -- and if Mr.
13 Blackburn knew that you weren't working on the case,
14 then somebody should have been bringing this to the
15 attention two months ago, rather than bringing it to
16 the attention as it is now the week of the trial.
17 Because the motion I got on March 22 indicated that
18 you'd been working tirelessly on the case. And your
19 latest filing, and my checking with financial shows
20 that you haven't been working on the case at all for
21 two months.

22 And so I guess I don't feel I can grant
23 this motion. I feel like I'm being told different
24 things by Mr. Davidson. And again, I'm not
25 undercutting anything I said out of sympathy for you

1 and your family. But I think you put the Court and
2 the parties in a very difficult position by not
3 working on this case for two months, knowing the
4 situation, and then trying to box the Court in by
5 saying that I've got to sever the case and continue
6 it. That's what you wanted all along. And it seems
7 to me that there is a little bit of concern that this
8 may be strategic, as well as --

9 MR. DAVIDSON: No.

10 THE COURT: -- as well as trying to help
11 your situation. But I'm quite willing to work with
12 you and Mr. Blackburn, Mr. Garcia, to get you
13 somebody else to come in and help. I'm willing to go
14 to Ms. Waters and see if we can help get some feed up
15 to Albuquerque, or something, so that you're fully
16 aware of what's going on here. And I'm willing to go
17 to bat and see if we can get some third attorney
18 involved in this case.

19 But I'm not sure that I'm in a position to
20 grant a motion to continue the trial, and to sever
21 Mr. Garcia. And it seems to me that that's the only
22 way he's willing to consent to your withdrawing. And
23 so I think it means probably I'll be denying that
24 motion to withdraw.

25 One other thing I'll say -- and I guess

1 maybe I should ask a question first. I know that
2 you've been in cases with me. Have you ever tried a
3 case? I mean, have you ever had a jury trial in
4 which you examined witnesses and picked a jury and
5 done an opening and done a closing? Have you had
6 that sort of trial experience?

7 MR. DAVIDSON: I haven't picked a jury, but
8 I've certainly examined many witnesses in evidentiary
9 hearings, and cross-examined, and openings and
10 closings.

11 THE COURT: How about a trial, though?
12 Have you ever participated actively in a trial?

13 MR. DAVIDSON: I have. The role I had with
14 Michael Davis in front of Your Honor in the Gould
15 trial -- that was, what, maybe eight or nine years
16 ago -- I think my role on that one was of a research
17 attorney role. But since then I've had many
18 evidentiary hearings, and in a sense bench trials.
19 And I have had bench trials. The trials that I've
20 had have not been jury trials. So I wasn't really
21 taking the lead on the voir dire part of it.

22 If I may address some of the concerns Your
23 Honor had about financial --

24 THE COURT: Well, I'll give you a full
25 chance to address those, I really will. But let me

1 ask a few questions.

2 MR. DAVIDSON: Sure.

3 THE COURT: I guess one thing I'm concerned
4 about is how much of this is driven by your wife's
5 health and your needs with her, and just how much of
6 it is being driven by your kind of walking in here
7 and looking at this courtroom and thinking about what
8 we're doing for eight months (sic)? I'll use my
9 language about, kind of freaking out about being down
10 here in Las Cruces and being in a courtroom for eight
11 days (sic), participating in this trial? How much of
12 it is that?

13 MR. DAVIDSON: That's not what it's about,
14 Your Honor. I haven't thought of withdrawing or
15 anything like that up until recent weeks.

16 THE COURT: Tell me about your wife's
17 schedule. We're here now on April 4. Tell me what
18 her schedule for radiology is going to be over the
19 next eight weeks.

20 MR. DAVIDSON: The recommendation is that
21 it starts -- let's see, the 16th of April is when
22 they're planning on starting it, if she's well enough
23 to proceed. There will need to be follow-up
24 appointments with the medical oncologist or radiation
25 oncologist to determine whether or not she's well

1 enough to do that. Right now, she's not able to
2 drive. When she walks, Your Honor, it's very slow.
3 And if she stays up from the time she wakes up in the
4 morning until 6:00 or 7:00 at night, it's an unusual
5 day. Most days she's not awake that often for an
6 extended period of time. She's not able to do much,
7 you know, around the house or anything like that.
8 And I understand that radiation can be very painful.
9 So that's her anticipated schedule. And they're
10 recommending five weeks of daily radiation. And I
11 understand it becomes very painful and a lot of
12 fatigue. And so I feel like I need to be there in
13 Albuquerque with her those days.

14 THE COURT: So you think the radiation is
15 going to be every day?

16 MR. DAVIDSON: They're saying every day for
17 five weeks. I don't know if it means seven days, but
18 certainly five days. My understanding it's daily
19 radiation.

20 THE COURT: And we don't know right at the
21 moment whether she's going to be strong enough to
22 start this; correct?

23 MR. DAVIDSON: Correct. But the current
24 thinking is it would start in mid April, on the
25 assumption that the recovery goes well. So far, the

1 recovery has not gone well.

2 May I address financial --

3 THE COURT: Yeah, go ahead.

4 MR. DAVIDSON: I don't know what they're
5 basing that on, because I submitted one --

6 THE COURT: They told me for \$3900 on --

7 MR. DAVIDSON: On the first quarter of --
8 well, the first quarter of my participation in this
9 case was the last quarter of 2016.

10 THE COURT: Well, I didn't go back that
11 far. What I told them to do --

12 MR. DAVIDSON: That's the only one I've
13 submitted.

14 THE COURT: You indicated that your wife
15 had been sick starting in late January, so I said go
16 back to about January 25 and tell me what his billing
17 is. And they said you submitted one bill for \$3900,
18 and it had been rejected.

19 MR. DAVIDSON: That was not for that period
20 of time. That was for the last quarter of 2016.
21 I've not submitted any bills for 2017 or 2018 yet.

22 THE COURT: And what am I supposed to draw
23 from that, that you're not submitting any bills?
24 You're not working?

25 MR. DAVIDSON: No, I'm working. I just

1 haven't submitted bills. I'm behind on vouchers as
2 well. Vouchers come when I have briefing and
3 preparing for trial and things like that to do with
4 the CJA billing, and sometimes take a back burner.

5 THE COURT: But you haven't submitted any
6 bills for 2017 --

7 MR. DAVIDSON: For 2017, correct.

8 THE COURT: -- correct?

9 MR. DAVIDSON: Nor for the beginning of
10 2018. So they're -- I can address -- I have been
11 working on the case, Your Honor. I have been working
12 diligently the whole time.

13 THE COURT: The brief that I got yesterday
14 said you really hadn't worked on this case.

15 MR. DAVIDSON: If I can explain. It's not
16 that I haven't been working, that's not what the
17 supplemental says. The supplemental says that my
18 productivity in preparing for trial over the last
19 several months has dwindled. There are a number of
20 projects that were assigned to me and allocation of
21 responsibilities, as far as helping out with the
22 joint defense efforts, that I had to back out of, and
23 other attorneys and other teams had to step up and
24 take over those. And the amount of time, that
25 little, to spend on Mr. Garcia's case has been

1 dwindling.

2 But, as I pointed out in the supplemental,
3 at each point along the way, I thought that I could
4 make up for lost time, and get back on top. At the
5 beginning, they weren't talking about radiation.
6 When she went in for the appointment and they talked
7 about radiation, that came kind of a blow.

8 MR. BLACKBURN: Judge, we can barely hear,
9 and Ms. Bean is having a hard time.

10 (The following proceedings were held in
11 open court.)

12 THE COURT: Guys, keep it down a little
13 bit. You can talk, but just a little bit down.

14 MR. BLACKBURN: Thanks, Judge.

15 (The following proceedings were held at the
16 bench.)

17 MR. DAVIDSON: We didn't know until -- I
18 can't remember the date of that appointment. But I
19 think it was the week before the hearings here on the
20 12th through the 16th, those hearings here. It was
21 right before that that we got the news that they were
22 saying that they had gotten as much of the cancer as
23 they could from the surgery, but that when they take
24 out the tissue, they looked at the margins, and the
25 margins were so narrow that they're recommending

1 radiation. And that's -- we didn't know that until
2 March. So that's a significant piece of the puzzle.

3 In late January, we knew that -- as I
4 pointed out in the supplement, the information is
5 constantly coming in, and it's building, but it
6 doesn't always build in one direction. Information
7 is going one direction, then the other. And at each
8 juncture I thought that I could get back up to speed
9 to help Mr. Blackburn and Mr. Garcia.

10 I can assure Your Honor that there is no
11 misrepresentation to the Court about the facts
12 related to this. And whatever the information the
13 people from financial are giving you is not accurate.

14 THE COURT: Well, it is accurate. You're
15 not billing anything, and you haven't billed anything
16 since 2016.

17 MR. DAVIDSON: That's right.

18 THE COURT: So it is accurate.

19 MR. DAVIDSON: I thought you were saying
20 they were saying that I hadn't been working in the
21 first quarter of 2018. That's not true.

22 THE COURT: Well, they probably can't
23 comment on whether you're working or not. But they
24 can tell me whether you're billing. And I guess they
25 were accurate that you're not billing us.

1 MR. DAVIDSON: Right. But that's not
2 because I'm not working. It's just --

3 THE COURT: You've got to admit it's a
4 little bit odd, though, to work on a case for a
5 year-and-a-half and not bill.

6 MR. DAVIDSON: Not necessarily.

7 THE COURT: I mean, we've got rules that
8 say you've got to turn in stuff -- I think it's every
9 90 days or something like that, or it's late, and you
10 may not get paid at all. I'm pretty liberal on that,
11 and I don't think I've ever dinged anybody for being
12 late. But I'm not sure I've ever had anybody that
13 hasn't billed for a year-and-a-half either.

14 MR. DAVIDSON: It was 45 days after the
15 close of the case, is the rule that I'm familiar
16 with.

17 THE COURT: Well, you're on interim billing
18 here, aren't you?

19 MR. DAVIDSON: I believe so, yes.

20 THE COURT: All right. Anything else,
21 Mr. Davidson?

22 MR. DAVIDSON: Did you want to add
23 anything, Billy?

24 MR. BLACKBURN: It was -- although, I mean,
25 I can only echo what Mr. Davidson is saying under the

1 circumstances, Judge, is that it wasn't that we
2 didn't -- that I didn't know that there was an issue
3 going on with him, but I'm not going to be the guy
4 that goes down and says, every day, like, can you do
5 this? Can you do this? Can you do this? I mean,
6 you know, so I was actually pushing Scott to say I
7 need to know, I need to know. But as a colleague and
8 as a personal friend, it wasn't like I was down there
9 saying: If you don't do this today, you need to tell
10 the Judge. Because I would go down and see what was
11 happening upstairs and downstairs in our office. And
12 I didn't feel comfortable doing that. I knew all the
13 stuff about the emergency room and everything spreads
14 in the office as you can understand.

15 So I just found a way to do what we needed
16 to do. And then, when we were sitting in here at the
17 motions -- actually, it was the day after we got the
18 verdict, I think it was the next day that Scott sent
19 me an email saying, It's just not going to work. And
20 Mr. Garcia was sitting next to me at the time. And I
21 let him see the email. And despite all the facts
22 that everybody has always asked for a severance, I
23 mean, you know, routinely, as you know, every defense
24 attorney is going to get up there -- and I'm sure it
25 probably happened at the last trial that Ms. Jacks

1 probably asked for a severance every day of the
2 trial. I'm not saying that that's -- so we're always
3 asking for severances, one, basically, I think as an
4 experienced defense attorney is to make a record to
5 make sure that it's there. Of course, I've had
6 judges say: You don't have to say that anymore, Mr.
7 Blackburn. It's repeatedly -- I got bit on appeal
8 one time.

9 So, but anyway, so you know, and we did
10 have a division of labor. I know that Scott does a
11 lot of -- he and I may have talked about hearings --
12 he's done Racing Commission hearings, hearings in
13 front of Judge Malott, so I know that he probably
14 doesn't have the experience in picking a jury like I
15 do, or doing voir dire. With all due respect, any
16 case I've ever done with you, I've done very little
17 voir dire anyway, because you do such a good job at
18 voir dire, so that is not something -- compliment to
19 you -- I don't know that you're going to be at Sandia
20 Prep looking at questionnaires anymore.

21 THE COURT: We're doing it soon here.
22 We're doing it soon.

23 MR. BLACKBURN: So you know there were
24 witnesses that we had broken up. He was listening to
25 the phone calls, and my staff and his staff are doing

1 the phone calls on Benjamin Clark and stuff. So we
2 did have a division of labor as to who was going to
3 do what.

4 You're right, I was going to probably do
5 most of the heavy hitters. And you're right, having
6 a second counsel is a luxury. And when I sat down
7 and talked to Scott about this, I said: Here's one
8 of the issues, is that other people like Mr. Lahann
9 hasn't had -- he just brought Shattuck on recently.
10 But I think it's a little bit different when he
11 decided at the very beginning -- if you would have
12 told me two years ago or something that I couldn't
13 have a second attorney -- not saying you wouldn't do
14 that -- but I mean, if I was in that position when it
15 went from death penalty to nondeath, I would have
16 been focused -- I would have been saying that is my
17 responsibility, I would have been doing everything.

18 But just in the last week, the last 10
19 days, we have received tons more discovery. And I've
20 barely even had -- because I haven't had a chance to
21 even look at that, because of just trying to get
22 ready for what was going to happen before.

23 So having two lawyers, once we made the
24 decision to have two lawyers, then I think that made
25 a different situation. If I would have known two

1 years ago that I was going to do this case by myself,
2 we wouldn't have this question. I think the Court
3 understands I would take that responsibility on.
4 When for the longest time Mr. Linnenburger worked for
5 me -- Paul was a great writer, he knew everything but
6 he didn't like to get up and ask questions, but the
7 knowledge that he had sitting next to me was just --
8 I mean, he knew more about the case than I did. Now
9 he's doing trials because he likes it. But I knew I
10 had that security blanket there, and then he's no
11 longer working for me. So that's when I brought in a
12 second security blanket, which would be Mr. Davidson,
13 knowing that even if he wasn't going to do this
14 witness, that he could tell me: Here's what this
15 witness is about. So -- and losing it at the last
16 second is difficult for me.

17 I'll just -- you know, I don't want to
18 cause any controversy or anything. You know me, I
19 try cases in front of you, and you know how we do in
20 an eight-week case if somebody is looking at life,
21 it's just really difficult for me. There are only so
22 many hours in day I can work on this, Judge. So --
23 and I didn't push Mr. Davidson on this. Maybe I
24 should have. I just didn't feel it was my -- I just
25 didn't feel -- my personal thoughts for him and his

1 family got in my way, that I didn't push him on that.
2 And I wouldn't feel comfortable doing that. But I
3 did to an extent, like: You need to let me know.
4 And then, when the radiation came, I just knew what
5 was going to happen.

6 So, anyway, that's the only thing I have to
7 say. And I've talked to this -- talked to Mr. Garcia
8 about this when we were coming down here for an
9 entire week. That was on a Tuesday. We found out --
10 we were here till Friday -- I mean, Arturo was not
11 happy, but he also understands the circumstances.
12 And I think we all do, I mean, he was not happy
13 because he knew he wanted to have Scott here and to
14 help and assist in the case. But this isn't like --
15 no one is claiming this -- it's not like this was
16 planned or anything. Under the circumstance, nobody
17 would ever want this to happen to anyone.

18 My mom had cancer last September -- and
19 July -- and I didn't work for almost a month. She
20 was 86, and had to move in with us. My life went
21 upside down. I couldn't think about anything but
22 that. But you know, I did what I could do. But that
23 was in September. You know, had that happened in,
24 you know, May of this year, or March of this year, a
25 little bit different situation, when your 86 year old

1 mother has to move in with you because she couldn't
2 care for herself because of the surgery. She had
3 colon cancer, and had to learn how to use a colostomy
4 bag. And I had to move for continuances in every
5 brief, except for the Tenth Circuit. I didn't do
6 that.

7 But anyway, I just wanted to explain that
8 to the Court.

9 THE COURT: Does the Government have
10 anything it wants to say? Mr. Castellano?

11 MR. CASTELLANO: Mostly just observation.
12 I understand the situation. I know that Mr.
13 Blackburn is an experienced attorney and is learned
14 counsel. I just don't know the breakdown and
15 division of labor. Maybe that's something the Court
16 can discuss separately when it deals with
17 attorney-client issues. Ms. Torracco is a recent
18 addition to the case. Mr. Granberg now has Mr.
19 Solis. Joe Shattuck, if I remember correctly, they
20 moved his admission only because of the volume of
21 jail calls and recordings. Other than that, I think
22 Mr. Lahann is ready to go. So we have other
23 attorneys. And the last trial we had a late addition
24 as well. So I think it can be done. But at the same
25 time, I understand the situation. But I just note

1 observations that we have people who are somewhat
2 similarly situated. But like I said, I understand
3 what Mr. Blackburn said. Had this been his case
4 alone, he would have prepared it as a sole
5 practitioner in a case. So I get that. So I don't
6 know if there is a need to talk to them separately
7 about the division of labor, and really how much
8 catching up he has to do, because he's had all the
9 heavy hitters, which is what I would expect with his
10 experience in this case. So I'm going to put that
11 out there as an example of other people who have had
12 recent changes or additions to the defense teams.

13 THE COURT: All right. Thank you, Mr.
14 Castellano.

15 Anything else you want to say,
16 Mr. Davidson?

17 MR. DAVIDSON: Your Honor, Mr. Garcia wants
18 to -- did you want to address the Court?

19 THE DEFENDANT: I've been listening to
20 everything that's going on and I understand pretty
21 much all of it. I want to say that I empathize with
22 him and his family. My sister had breast cancer; she
23 lost. So I know radiation, chemo, all that. And I
24 know it's going to be a hard process. But keep in
25 mind, they both committed to giving me the best

1 defense that I'm entitled to have. I'm not guilty of
2 nothing. And I need them to help me get through
3 this. I'm facing the rest of my life. Not just for
4 this trial, but there is another trial. I mean, all
5 of a sudden, things are not looking too good with my
6 team. Like I say, if he can't commit 100%, what good
7 is he going to do me, Your Honor? If I can't get --
8 and he's 80 percent, what good is that going to do
9 me?

10 I don't know about a severance because it
11 might affect everybody else. Most everybody is ready
12 to go. I mean, a continuance -- you guys are the
13 experts in that. I don't know. So I prayed on it
14 last night. I'm not very religious. But at this
15 point in my life I've got to ask somebody for help.
16 I'm going to leave it in your hands. Whatever you
17 decide, I've got to trust that you got my best
18 interests in mind, you know. And that's all I could
19 say. And I hope that his wife pulls through. What
20 else could I say?

21 THE COURT: All right. Thank you, Mr.
22 Garcia.

23 THE DEFENDANT: You're welcome.

24 THE COURT: Well, let's do this: I'm going
25 to deny the motion without prejudice to renew it. It

1 sounds like we've got some other issues that we have
2 to deal with that may in some ways moot this out.
3 You know, it does seem to me that this should have
4 been brought to the attention of the Court earlier.
5 And I do think that I understand what you're saying.

6 But Mr. Garcia just points out, it's his
7 life, it's his defense. We're all professionals. If
8 we don't think we're going to be able to do the job,
9 we've got to start alerting everybody earlier. And I
10 think this probably should have been brought to the
11 attention two months ago, because it doesn't look
12 like a lot of work has been done by Mr. Davidson over
13 the last two months, and probably the Court should
14 have been apprised of that, and we could have made
15 some things differently.

16 I'll deny it without prejudice. We'll see
17 how Mr. Davidson's wife does. If she's not able to
18 do the radiation, then it may mitigate some of the
19 issues. If it turns out that she does go into
20 radiation, we may have to do something else.

21 My offer still stands, and I think y'all
22 might think about it and let me know, going back to
23 Ms. Waters and seeing if I can get another attorney.
24 The clock is ticking on us. I wish we were even back
25 on March 22 now, and getting somebody in play. I

1 think that would be better than nothing. If you
2 don't want it, I won't force it. But if you do want
3 it, I'll start working with Ms. Waters. We're well
4 beyond CJA panel, looking at the people that are
5 representing the witnesses are not CJA panel. So I'm
6 looking for good state lawyers. And they don't even
7 have to be in the state. I'll go to El Paso, or
8 we'll fly somebody in from somewhere else, get them
9 here and pay the expenses and I'll leave it to Mr.
10 Blackburn and Mr. Davidson and Mr. Garcia to
11 determine where you're physically at.

12 As far as the Court is concerned it doesn't
13 matter. It may matter to Mr. Blackburn that you're
14 sitting there. It may matter to Mr. Garcia that
15 you're sitting there. And I'll have to -- you'll
16 have to take your directions from them. And I'm
17 willing to get somebody on board. And I'm willing to
18 work with Ms. Bean and see what we can do about
19 either getting a feed, or some other lawyer on board.
20 But I think right now the motion to withdraw is
21 unopposed. If it's accompanied by a continuance and
22 a severance -- and I don't think that would be fair
23 to everybody, because I do think that some of this
24 could have been mitigated greatly if we'd have gotten
25 on it a couple of months ago. As far as those are

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1 concerned, we've looked at it several times. I've
2 continued to look at it. I've looked at it again
3 yesterday, been looking at it today. It just doesn't
4 seem that a severance or a continuance is appropriate
5 on that score. It may be forced on us by other
6 issues and things. But at least as to this one, I
7 think we can probably work around it for the present
8 time.

9 So for the present time, I'll deny that
10 motion without prejudice to renewing it, depending on
11 how things develop, and what resources and assets we
12 can bring to bear to mitigate any harm to
13 Mr. Garcia's defense. And I've got to tell you that
14 I guess I certainly understand how we prepare for
15 trial. I've prepared for them many times. And I've
16 now seen over the last 15 years how they're prepared.
17 And it's no surprise to anyone that there is a
18 division of labor. I think I have a pretty good feel
19 from y'all being in front of me how this case was
20 probably divided up. And you know, I'm drawing a lot
21 of comfort from the fact that you've got two very
22 good lawyers here, and Mr. Blackburn can try a case,
23 no doubt about it, so I'm drawing a lot of comfort
24 from the fact that you don't just have anybody, you
25 have Billy Blackburn representing you in this trial.

1 THE DEFENDANT: I keep hearing that.

2 THE COURT: You know what, you and I are
3 going to get a front row seat. It will be a show.
4 He'll do a good job now. And I think Mr. Davidson is
5 going to have to make some decisions about how much
6 he can work on this case and things like that. And
7 if y'all get together, and here at a break or
8 sometime during the day, and you want me to start
9 trying to swing additional resources in to help, I'll
10 try to do that.

11 I think, realistically, that even if Mr.
12 Davidson is back in Albuquerque at times during this
13 trial, more than good chunks of it during the trial,
14 I know that I never got out of my mind my work, even
15 as bad as things might get in life, if I had made a
16 commitment to represent somebody and I had something
17 like this come up, you know, practicing law and being
18 a judge for 30-plus years, things just come up.
19 And -- but I was a professional, and I just never
20 wanted to let anybody down. And I think --

21 MR. DAVIDSON: Your Honor, if I may just
22 address what you're saying. The Court's thought that
23 it should have been raised earlier. It is April 4
24 now. And I do realize that we're now on the eve of
25 trial. But two months ago all we had was a

1 diagnosis. And the earlier indications were -- as I
2 pointed out in the supplement, it sort of grew. Two
3 months ago it was just going to be -- the thoughts
4 were that it might just be a lumpectomy. And we had
5 friends who had lumpectomies, and it's not that big a
6 deal. Then, as we got more appointments, then it
7 became clear that it wasn't only going to be a
8 lumpectomy; it was going to be a full mastectomy.
9 And then the initial thought was that the nature of
10 the cancer, that a surgery would be all we would
11 have. And then when they looked at the pathology
12 after the surgery, then it became clear that the
13 margins were very narrow, and so the cancer was right
14 into the edge of the chest wall. And so that's the
15 reason for radiation is -- there is no real way for
16 them to know, Your Honor, whether she still has --
17 right now, whether she still has cancer in her body
18 or not. So the radiation is to zap it, you know, to
19 increase the chances. There is no 100%. I've looked
20 at the medical literature that the radiologists have
21 given me. There is no 100%. So I guess I use the
22 analogy in the supplement of a frog in a pot of
23 water.

24 Two months ago, Your Honor, I didn't know
25 that I would be in this situation. It really only --

1 it accumulated. And so I just want the Court to know
2 that had I known two month ago what I know now, or
3 had there been a good reason to believe two months
4 ago what I know now, I should have -- I would have
5 told the Court.

6 We're not waiting to the eve of trial to
7 gain some advantage. This isn't gamesmanship. We
8 didn't plan any of this. And I didn't know -- we
9 don't know these facts until they come in. So I just
10 wanted to let the Court know that.

11 And I also want -- it's not the case that
12 since January there hasn't been any work done in the
13 case. It's just that my -- the number of hours per
14 day that I have been able to devote to his case has
15 dwindled over my time. And I've seen my productivity
16 when I'm working -- just my ability to concentrate
17 has dwindled.

18 So sometimes looking back on things are
19 clearer than when you're in the middle of it. So
20 when Mr. Blackburn put the question to me: I need to
21 know what your decision is, I informed him about the
22 radiation coming up. And then he said, Okay, then
23 you need to start preparing a motion to withdraw.
24 And you know, I got it, and filed it as soon as I
25 could.

1 And then a couple days after I filed the
2 motion, I started thinking about additional
3 information that I wanted to bring to the Court's
4 attention. And that was the reason for the
5 supplemental memorandum in support of that motion.
6 And I do apologize. I could have -- looking back, I
7 should have filed this somewhat earlier. I just want
8 to alert the Court that there is no way that I could
9 have done this two months ago, because, in fact, I
10 didn't know this information two months ago. And
11 even the beginning of March, at the beginning of
12 March she was in the hospital, but we didn't know
13 what was going to happen.

14 So I just want to inform the Court of the
15 timeline. Because it seems that the Court's
16 decision -- I understand you're denying it without
17 prejudice, but it seems like it's driven in part by
18 the feeling on the Court's part that I haven't been
19 doing any work on the case for two months, and that I
20 waited around till essentially today to bring it up.
21 And I just wanted to alert the Court of the timeline.

22 THE COURT: Well, when you have a chance,
23 sit down and read your -- I know it's a bit of a
24 stream of consciousness -- the supplemental, but you
25 might ought to reread it. Because I don't think that

1 would give the Court any confidence with the fact --
2 I know you've given an explanation of no billing, but
3 if you read that document -- and in fact, we've not
4 received any bills -- I'm not sure how much
5 productive work you've done over the last two months,
6 given what's in the supplemental.

7 MR. DAVIDSON: It certainly has been
8 difficult.

9 THE COURT: All right. Well, let's go back
10 on the record. I'll announce my ruling without much
11 detail, and then we can figure out where we're going
12 to go from here.

13 MR. CASTELLANO: Your Honor, as counsel
14 have been talking at the bench here, if you can give
15 us some time today, we're trying to work on a
16 resolution which potentially would move Mr. Garcia's
17 case into the July trial. We haven't made a final
18 decision yet. But if we do agree to do that, we
19 could sever him on not the entire count, and that
20 would give counsel the chance to resolve any issues.

21 I know it's kind of a play it as you go
22 deal with Mr. Davidson's wife, but it is something
23 we're contemplating. I can tell the Court the overt
24 acts in the RICO trial set for July covers the same
25 conduct with which Mr. Garcia is charged in this

1 case. There are actually two murders among the overt
2 acts. So if the Court can give us some time, we may
3 be able to come to an agreement which would buy us
4 time and potentially resolve some of these issues, or
5 at least give us some more time to let them resolve
6 themselves. But we haven't made a decision yet,
7 since we're just talking at the bench. But it's
8 something we're contemplating.

9 THE COURT: Well, and you're probably going
10 to need to talk to the defendants in that case. They
11 may not be wild about -- that's a nine-defendant case
12 as it is -- turning around and having that case get
13 bigger.

14 MR. CASTELLANO: I can tell the Court that
15 Mr. Garcia is already charged in that case, so he
16 would not be an additional defendant. And the
17 conduct charged in this case is in the overt acts in
18 that case. So I don't think it would be an
19 additional amount of defendants or presentation of
20 evidence. I think we'd be presenting the same
21 information at that trial.

22 THE COURT: I still probably would want to
23 have those defendants' views on that.

24 MR. CASTELLANO: Sure, because it would
25 result in a joinder.

1 THE COURT: Because if they oppose it, I am
2 not -- I think we'd probably have to get them in here
3 and argue it, and create some logistical issues.

4 MS. ARMIJO: What I was going to suggest
5 taking time for Mr. Blackburn -- obviously he's
6 already a defendant in that case -- reach out to them
7 and get their position, so we can file something.
8 And if it's unopposed, that would make it easier.

9 THE COURT: If it's all unopposed, I don't
10 think these guys are going to care. But if it's
11 unopposed and if no one sees some problems that way,
12 then I probably am not going to oppose it. But I'm
13 not going to get my hopes up too much. I haven't
14 seen much in this case that's unopposed. So maybe
15 I'll be surprised.

16 MR. BLACKBURN: Well, different people -- I
17 don't know.

18 MR. BECK: We've got Billy going to bat for
19 us.

20 MS. ARMIJO: That's why we're putting it on
21 him.

22 THE COURT: Mr. Garcia is going to find out
23 right off the bat how good a lawyer he is.

24 There was something I was going to say on
25 that, but it escapes my mind. Well, is that going to

1 solve, though, any of the conflict issues? Does that
2 go away?

3 MR. BLACKBURN: Judge, we don't know if it
4 does now. Because I wanted to sort of echo what the
5 Government was saying this morning. I just sort of
6 raised that initially. And she spoke a little bit
7 more about it. But it was -- even though Mr. Garcia
8 was listed on the witness list, it was my
9 understanding he was not going to be called because,
10 as she said, he was not being Government friendly.
11 And so things, unfortunately, changed, which I've got
12 to admit was somewhat news to me whenever the other
13 teams brought him in here. I had read the motion,
14 but then when he came in and started to testify, I
15 wondered if I needed to say anything. But the Court
16 got him a lawyer.

17 But sitting there watching this develop, I
18 sort of knew what was going to happen. In fact,
19 after he testified, I'm standing over there talking
20 to Agent Acee. And I said, "Well, I can predict
21 this: You're going to go arrest him; you're going to
22 charge him with perjury, and then he's going to be
23 cooperating."

24 And he goes, "Yep."

25 And so -- and I spoke to Arturo,

1 Mr. Garcia, about that that day. And then I know
2 that Mr. Beck -- and they've been very honest about
3 this -- I started asking, once the indictment came
4 out, thinking, okay, I'm smart enough to figure this
5 one out. So I started sending an email to the
6 Government saying: What are you guys going to do?
7 Well, he didn't have his arraignment till yesterday.
8 Then I understand that they talked with him
9 yesterday, and Mr. Beck talked with him for just a
10 little bit of time. They didn't get into all the
11 issues about what he would testify about Mr. Garcia
12 in this case, or what he would testify to him about,
13 the Sammy Chavez case.

14 So this gives us an opportunity for them to
15 go back and figure that out. And if it comes to such
16 an extent that he -- and I'm just foreseeing it --
17 but comes to such an extent that there would be an
18 actual conflict because of my ability to
19 cross-examine him or not cross-examine, to set up
20 some firewalls, because I can't set the firewalls
21 now, if Mr. Davidson is not going to be involved to
22 some extent. It would give us time to figure this
23 out, to get another lawyer. If I'm going to have to
24 leave of the case, that gives us plenty of time to
25 make -- for them to explore that. I mean, I know

1 that they haven't done all of their debriefing on it,
2 because it was just a debriefing yesterday -- Mr.
3 Beck can talk to that -- because they needed to get
4 him on board. But pretty much, I understand he will
5 testify against a majority of the people in this
6 case.

7 He can be impeached on the 1994 conviction.
8 It was based upon that that he went to custody for 24
9 years. It was a gang deal there also. It wasn't
10 SNM. He was only 19 years of age or 20 years of age.
11 But I think that gives us an opportunity to figure
12 out how I can possibly stay in the case. Because I
13 know he wants me to, because then the person that
14 needs to see the show, he's not going to be able to
15 see the show if they move to continue, if they move
16 to boot me out, and he loses myself.

17 And so that's what we're thinking. If we
18 move into that, that gives us time to do -- and I'm
19 willing to work with them on that. I think I can
20 convince the other people. I just need to talk to
21 Mr. Davidson and Mr. Garcia about that.

22 THE COURT: Okay. Let me go ahead and
23 announce the ruling on this. I think I made a record
24 here. And I won't elaborate too much in open court.
25 But let me do that, then we'll probably be taking a

1 break in about five minutes.

2 MR. BLACKBURN: All right.

3 MR. DAVIDSON: Thank you, Your Honor.

4 (The following proceedings were held in
5 open court.)

6 THE COURT: All right. We'll go back on
7 the record after being here at the bench.

8 You know, as I have indicated up here at
9 the bench, I've indicated in open court, it's a very
10 difficult situation for Mr. Davidson. It's a very
11 difficult situation for Mr. Garcia's defense team.
12 It's difficult for all of us; not so much the other
13 defendants, but for the Government and their
14 planning, and the Court, and all the logistics that
15 we made to get to this point.

16 I am going to deny the motion without
17 prejudice. I've offered some scenarios and
18 solutions, some resources that I think might mitigate
19 some of the concern. And Mr. Garcia and Mr.
20 Blackburn and Mr. Davidson are going to look into
21 those. And if necessary, then I'll be going back to
22 Ms. Waters to see if we can do some things, maybe
23 working with Bean also, to see if we can mitigate
24 some hardship to Mr. Davidson, also Mr. Garcia, and
25 Mr. Blackburn in preparation of their defense.

1 So we'll be monitoring the situation. I'll
2 deny it without prejudice, and we'll see how things
3 develop.

4 We've got some other issues that have
5 arisen here on the eve of trial that may also play
6 into that. So I'll deny that.

7 We're getting close to a break. There is
8 something that we need to discuss. Like I said,
9 there was a number of things that I was told had to
10 be talked about first. And I'm willing to go in your
11 order. Otherwise, I suggest maybe we take the break
12 and come back and do bad acts for Mr. Billy Garcia, I
13 think is the first one up.

14 Anybody want to think something else ought
15 to be discussed? Mr. Castle -- I mean, Mr. Burke?

16 MR. BURKE: May I inquire how it was
17 resolved with regard to Mr. Blackburn's conflict?

18 THE COURT: It hasn't been resolved. There
19 was a bit of discussion, because I think there was
20 some -- I think y'all are all feeling like that needs
21 to be done before Mr. Davidson. And I kept trying to
22 get back on track. I think maybe during the break
23 y'all can talk with Mr. Blackburn and with the
24 Government. But I tried to -- I think some of those
25 things ought to be done with everybody involved,

1 because I think those are issues that I think -- I
2 can't say they weren't discussed up here, but I tried
3 to keep us on track of focusing on Mr. Davidson's
4 situation. And I think most of the other issues
5 about Mr. Blackburn ought to be done with everybody's
6 participation.

7 MR. BURKE: I understand. I jumped the
8 gun.

9 THE COURT: No, you didn't jump the gun. I
10 did try to keep us on-track with focusing here.

11 Mr. Castle.

12 MR. CASTLE: Yes, Your Honor. In order for
13 us to be able to participate fully in that issue
14 concerning the conflict, what I would request is that
15 the handwritten notes or any notes that were taken of
16 Mr. Garcia's recent interview with the Government be
17 turned over to defense now. And also, it sounds like
18 there was a previous time where Mr. Garcia -- I
19 should say which Garcia -- James Garcia -- James
20 Garcia had told the Government that he did not want
21 to cooperate. That's obviously a Jencks statement
22 also. If they could turn over those items to us, I
23 think we could more intelligently address conflicts
24 and whether Mr. Garcia is a necessary witness in this
25 case.

1 THE COURT: Why don't y'all do this: Why
2 don't y'all talk to the Government and Mr. Blackburn
3 during the break. And then, if we need to, if the
4 Court needs to start weighing in on those issues,
5 then I will.

6 And then also, y'all kind of be prepared
7 after the break to tell the Court what you want to
8 take up first. Otherwise, we'll take up Mr. Billy
9 Garcia's bad acts. All right. Let's be in recess
10 for about 15 minutes. If you're going to need a
11 little bit more, tell Ms. Bevel, and otherwise, I'd
12 like to -- kind of since we're all down here and our
13 clock is ticking -- I'd like to kind of stay on the
14 motions and get those done, so that we can get as
15 much done before we start trial. But if you need
16 more time or something, talk to her. I'm not sure
17 I'll grant it. But I'll certainly listen.

18 All right. We'll be in recess for about 15
19 minutes then.

20 (The Court stood in recess.)

21 THE COURT: All right. We'll go back on
22 the record. Is there a candidate for what's next for
23 us to hear, or we just start with Mr. Garcia's bad
24 acts motion? Do you want to do that one, Mr. Castle?

25 MR. CASTLE: Yes. Your Honor. When we

1 were here last, the week of March 12, this motion
2 came up, and we were in the midst of doing some
3 preliminary arguments. We moved on to other issues.
4 At that time, the Government indicated that there
5 were two bad acts that it was relying upon; the first
6 being a bad act on February 25, 1992, or at least --
7 I'm not sure they termed it a "bad act" -- they might
8 have termed it as "enterprise evidence." And the
9 second being an event on March 14, 1999. This
10 morning they've added two more. But I'd like to
11 address at least the first two that we were advised
12 of as of last March 12.

13 THE COURT: Do you have -- did you receive
14 a letter from the Government?

15 MR. CASTLE: Yes, it's attached as Appendix
16 A to our 1308, our Docket 1380.

17 THE COURT: Okay. You're going to have to
18 maybe give me a copy of that letter. In the folder
19 that I brought down with me, I think I didn't bring
20 that down. So if you've got a copy, or if you can
21 let --

22 THE CLERK: I can print it, Your Honor.

23 THE COURT: Or have Ms. Bevel make a copy
24 from yours. I don't seem to have your letter.

25 MR. CASTLE: Your Honor, we do not seem to

1 have a printout. Because it's very -- I don't know,
2 if the Court wants, I can read it.

3 THE COURT: Let me have Ms. Bevel print
4 out -- it's attached to your 1358?

5 MR. CASTLE: Yes.

6 THE COURT: 1308. Okay, she'll print it
7 out. Then if you're going to put it on the screen --

8 MR. CASTLE: Yes, that would be great, if I
9 could figure out how to do that. The first one is
10 highlighted in blue, Your Honor. It's, "On or about
11 February 25, 1992, while in the custody of New Mexico
12 Corrections Department, Billy Garcia threatened a
13 correctional officer."

14 THE COURT: This is the one we were talking
15 about, whether it was in the timeframe in which there
16 had been kind of a war declared on COs?

17 MR. CASTLE: I don't know. That was, I
18 think, in regard to a different defendant. We never
19 really got into it, so I don't know what their offer
20 of proof would be for the admissibility of this. Of
21 course, it's 26 years ago and is not in the realm,
22 really, of the focus of this indictment.

23 THE COURT: I know that. I don't know the
24 age of Mr. Garcia, but he looks like a little bit of
25 an older gentleman. Was he alleged to have been a

1 member of the SNM Gang at the time, in 1992?

2 MR. CASTLE: He was, Your Honor, but if I
3 could remove my computer for a moment, because I want
4 to show the Court what this is regarding. This is
5 the report we have of it. And this was a -- some
6 kind of a disciplinary report that was done right
7 after that event. And what it indicates is that
8 "Mr. Billy Garcia became verbally abusive with an
9 officer when he was serving chow in V pod by saying,
10 'Get the fuck out of here'" --

11 THE COURT: Can you point where you're --

12 MR. CASTLE: I'll do that rather than say
13 the words.

14 THE COURT: That's all right. Go ahead.

15 MR. CASTLE: And the report indicates that
16 "Billy Garcia became abusive due to the fact that
17 Officer McReynolds refused to pass potato chips to
18 Garcia." It's nothing to do with the SNM. I've
19 heard many things about the SNM, but I don't know
20 anything about the rules of the SNM having to do with
21 passing potato chips. So I don't know why they
22 believe this has anything to do with the indictment
23 in this case whatsoever.

24 That's what we have on it, Your Honor.

25 THE COURT: Why don't we take these one at

1 a time and let me see. Ms. Armijo, Mr. Castellano,
2 who is going to try to link this up with SNM?

3 MR. CASTELLANO: Yeah, I think we could,
4 Your Honor. But I think at this point, we'll just
5 not worry about that one. I think we have other
6 things we can discuss. We can forego the 1992
7 conduct.

8 THE COURT: All right. So that one is out
9 now?

10 MR. CASTELLANO: Yes, sir.

11 THE COURT: Okay. So it's out.

12 What else do you have, Mr. Castle?

13 MR. CASTLE: The second one is also
14 highlighted in blue. It's "On or about March 14,
15 1999" --

16 THE COURT: I have your letter now, so if
17 you want to tell me where -- which one it is. March
18 14?

19 MR. CASTLE: Yes, it's on page 2 of the
20 letter, and it's "On or about March 14, 1999" --

21 THE COURT: All right. I see it.

22 MR. CASTLE: -- "while in the custody of
23 New Mexico Corrections Department, Billy Garcia
24 refused to be restrained or removed from his cell,
25 and chemical agents were used to regain his

1 compliance."

2 THE COURT: What does that mean? Is that
3 teargas, something like that? Is that what they mean
4 by 'chemical agents'?

5 MR. CASTLE: Either that, or I would guess
6 maybe Mace, or something of that nature.

7 THE COURT: Okay.

8 MR. CASTLE: Once again, I don't know what
9 this is about.

10 THE COURT: Do you have any 302 or prison
11 report on this incident?

12 MR. CASTLE: I'm going to go back to my --
13 if I can -- we received these documents just a couple
14 of days ago, Judge. So here is the incident that we
15 were able to see. I don't know if the Court can see
16 it. The bright lights aren't on it. It indicates on
17 March 14, 1999 -- it goes on to indicate that
18 Mr. Garcia refused to comply with directives issued
19 by failing to respond and maintain his position in
20 the cell. There is nothing about it being in regards
21 to the SNM. The reason I'm scrolling down --

22 THE COURT: Can I read a little more?

23 MR. CASTELLANO: I'm sorry.

24 THE COURT: I'm not quite fast enough for
25 you.

1 All right. Do you want to go ahead and
2 scroll.

3 MR. CASTLE: Your Honor, the person who is
4 the witness to that is a person by the name of
5 Stanley Moye, M-O-Y-E. I do not believe this
6 individual is even endorsed as a witness. The reason
7 the Government is giving us discovery now is because
8 it was ready for this hearing, but, of course, it
9 gives us no ability to do any investigation on what
10 happened 19 years ago. But I would suggest that,
11 given this offer of proof, that there is no
12 connection whatsoever to the SNM at all. This looks
13 like somebody, for whatever reason, didn't want to
14 come out of their cell, and the guards sprayed them.
15 That's clearly just character evidence designed to
16 make him look obstreperous, obstinate, and difficult,
17 as an inmate 19 years ago.

18 THE COURT: All right. Mr. Castellano,
19 anything on this 1999, March 4, incident?

20 MR. CASTELLANO: Yes, Your Honor. We are
21 trying to pull up the additional report for evidence
22 on that. My understanding -- and I'm looking at the
23 report here in a second -- is that other SNM members
24 also engaged in that conduct, so as a show of
25 solidarity with other SNM Gang members, I believe

1 including Mario Montoya and Paul Rivera. That's what
2 I'm checking right now.

3 THE COURT: Would it have been
4 contemporaneous with this March 4 incident?

5 MR. CASTELLANO: I believe it would. But
6 I'm going to pull the report here in a second and
7 verify that.

8 Obviously, to say that an inmate was being
9 difficult, the Court has heard plenty of evidence
10 about SNM Gang members giving the Corrections
11 Department a hard time. So that was -- actually, the
12 ultimate goal of the SNM was to give them a hard time
13 and also intimidate the corrections officers.

14 Your Honor, one of the reports I'm looking
15 at, I think is a disciplinary report from
16 Mr. Garcia's file. A number of members of the
17 Penitentiary of New Mexico Emergency Response Team
18 responded to a number of inmates failing to comply
19 with orders. They covered their cell windows and
20 refused to comply.

21 THE COURT: Do you think that's all you've
22 got, or do you have any more?

23 MR. CASTELLANO: The report indicates that
24 at 3:55 in the morning one of the captains began
25 issuing directives to inmates in housing unit 1 B, E

1 pod to remove the coverings from their cell doors,
2 and back up to the cell doors, allowing themselves
3 to --

4 THE COURT: What is the date of this one?

5 MR. CASTELLANO: It's the same date, Your
6 Honor.

7 THE COURT: And that is the date, March 14,
8 the 1999.

9 MR. CASTELLANO: Yes. The report is March
10 14, 1999.

11 MR. CASTLE: Is there a Bates number?

12 MR. CASTELLANO: No. This is the agent's
13 copy from the disciplinary file.

14 MR. CASTLE: I can't do anything if I don't
15 have a copy of it, or --

16 THE COURT: Has this one been produced, Mr.
17 Castellano?

18 MR. CASTELLANO: I have to check, Your
19 Honor, but it should be, the disciplinary files for
20 the defendants have been turned over, so it should be
21 in there, but I will confirm that. So the process
22 was done on an individual basis. The inmates refused
23 to comply, and once each inmate was removed, they
24 would move on to the next inmate. So there were a
25 number of inmates who weren't complying. And the

1 process was continued until all inmates in E pod had
2 been removed from their cells, and their property
3 removed.

4 THE COURT: Well, at least what he's
5 reading to me, Mr. Castle, it seems like it's a
6 coordinated event by the SNM to demonstrate some
7 power that day.

8 MR. CASTLE: I didn't hear him say anything
9 about the SNM. It sounds like --

10 THE COURT: He said a captain. I assume --
11 is that a captain of SNM, or is that a captain of the
12 Corrections Department?

13 MR. CASTELLANO: The captain was from the
14 Corrections Department. But other members mentioned
15 are Paul Rivera, who was an SNM member; Mario
16 Montoya, who is an SNM member; Shawn Ural, who was an
17 SNM member; Billy Garcia, who is; Joe Martinez, who
18 was an SNM member. And some of the other names I
19 don't recognize, but there are 11 names mentioned as
20 present and/or having witnessed the event.

21 THE COURT: How many of the people that
22 participated in this demonstration, or of that 11 are
23 SNM identified members?

24 MR. CASTELLANO: At least six, Your Honor.
25 And two of those witnesses are witnesses for the

1 upcoming trial, those being Paul Rivera and Mario
2 Montoya.

3 THE COURT: Well, seems like that's enough.
4 What do you think, Mr. Castle?

5 MR. CASTLE: Your Honor, when Your Honor
6 entered the courtroom, all of us rose. The majority
7 of us were defense lawyers. That doesn't mean that
8 it's a coordinated effort of all the defense lawyers.

9 And so it sounds like half of them were SNM
10 members, half weren't. This sounds to me like a
11 number of inmates trying to show the corrections
12 officers that they're upset about something.

13 But the reason I have this on the screen is
14 this is the superseding indictment. They have not
15 alleged as part of the indictment that the SNM used
16 intimidation of guards in any fashion other than to
17 prevent law enforcement officers from identifying
18 offenders, apprehending offenders, or successfully
19 prosecuting and punishing offenders.

20 So what they're trying to do is go outside
21 indictment, which is why it's a bad act. And all
22 they're trying to do is say: These are bad guys,
23 they did some bad things, they caused problems, and
24 jury, why don't you lock them up forever.

25 That's exactly 404(b) evidence. And they

1 alleged this indictment extremely broad. They did
2 not allege that the SNM had, as part of its plan, to
3 just upset guards and intimidate guards by, I guess,
4 refusing to come out of their cells.

5 THE COURT: Well, I think I've certainly
6 heard over the last few months the testimony to that
7 effect at various times. So I'll overrule the
8 objection to this incident and allow testimony. I
9 think there is enough SNM members participating that
10 it is a reasonable inference that it was motivated,
11 at least in part, to maintain or advance positions of
12 the SNM members.

13 Did you have another one in that, or was
14 there one more?

15 MR. CASTLE: They told me about a third one
16 today.

17 THE COURT: Is this still in the letter?

18 MR. CASTLE: It is in the letter. It says
19 "On or between 1993 to 1998, Billy Garcia sponsored
20 the admission of several people into the SNM." I
21 believe that, given the scope of the indictment and
22 this Court's previous rulings, that that kind of
23 evidence would come in, as long as an appropriate
24 foundation is laid that they had personal knowledge
25 of that. And so that's the only record I'm making.

1 THE COURT: All right. So with your
2 reservation of those objections, which we'll have to
3 handle as the evidence comes in, I'll permit the
4 Government to offer that evidence.

5 Does that take care of your motion then,
6 Mr. Castle?

7 MR. CASTLE: No, Your Honor. There is one
8 more. This morning, for the first time, the
9 Government indicated to myself --

10 THE COURT: And this is not going to be in
11 the letter?

12 MR. CASTLE: No.

13 THE COURT: Okay.

14 MR. CASTLE: -- that they were going to try
15 to bring in evidence concerning the 1990 murder of an
16 individual by the name of Bobby Ortega. And the
17 allegation is that Mr. Garcia ordered it, is what I
18 was told.

19 THE COURT: Tell me a little bit about
20 Mr. Garcia. Is he alleged to have been a leader of
21 the SNM Gang?

22 MR. CASTLE: I believe that at that time he
23 was alleged to have been a leader. I think their
24 arguments -- the few minutes I've had since they
25 announced this, I went back and looked at Mr. Robert

1 Lovato -- who is the source of this information --
2 his statement. And what Mr. Lovato says is that
3 Mr. Garcia ordered the hit of Mr. Ortega; that others
4 carried it out in a different facility, and killed
5 Mr. Ortega.

6 I have a number of problems with that.
7 First of all, on April 5th of 2017, ironically almost
8 a year ago today, we filed our motion requesting
9 disclosure of bad acts because of the very fact that
10 we needed to investigate and prepare, in the event
11 that we had to face it. And we did it broadly. We
12 said it was not just bad acts, but it was also res
13 gestae.

14 Because if the Government was going to
15 bring it in, as part of the enterprise evidence,
16 number one, we had a greater need to defend against
17 it, but number two, they had a greater need, under
18 Rule 16, under Giglio and Brady, to provide
19 information to us, because it's part of the elements
20 of the offense and it's going to be part of the
21 presentation of the elements of the offense. They
22 have that duty.

23 On May 22, they gave us their notice and
24 it's right before the Court. And the letter was
25 dated May 22, did not include the Ortega murder. We

1 responded on October 10th. And now, today, we find
2 out about this.

3 In the few minutes that I have had to
4 review that, what I can tell the Court is this:
5 Number one, we don't have any of the discovery from
6 that murder. It was prosecuted. People were
7 convicted of that murder. People that aren't Billy
8 Garcia. Obviously, that prosecution has exculpatory
9 information, because the jury convicted someone other
10 than Mr. Garcia as being involved in it. And so
11 that's very concerning, if they're going to bring up
12 evidence that's part of the elements of this offense,
13 that being the criminal enterprise element, that they
14 did not go and search and perform their obligations
15 under Brady and Giglio or under Rule 16, for that
16 matter. We don't have any of the tests done; for
17 example, the autopsy reports, things of that nature,
18 which are required, under Rule 16, to be produced
19 long ago. So they have not performed their Rule 16
20 functions with regards to this enterprise element act
21 of this Robert Ortega murder.

22 But it even gets worse than that, and I
23 want to show the Court a few pages from discovery
24 that I discovered in the few minutes I've had. If we
25 could pick up page 645 of discovery. If we could

1 highlight the portion on Bobby Ortega. This is a
2 page of discovery dealing with a confidential
3 informant, who has not been disclosed to the defense,
4 indicates Bobby Ortega was killed by other SNM
5 members, and it was ordered by Angel Munoz. Nothing
6 about Billy Garcia. That's an exculpatory witness
7 for the defense. If the Court is going to allow this
8 late allegation to come in, we're going to need
9 disclosure of that person so that we can defend
10 against it.

11 THE COURT: Now, the person you're thinking
12 needs to be disclosed is the person that's giving the
13 FBI this information?

14 MR. CASTLE: Yes, Your Honor. And I would
15 just --

16 THE COURT: And you don't know who that is?

17 MR. CASTLE: We do not know who that is.
18 But I can tell you that a lot of the people that are
19 involved, my understanding, are no longer alive.
20 Felipe Cordova, who allegedly ordered the murder, has
21 passed away. Well, that's the one I know of.

22 THE COURT: So, if I'm reading this
23 correctly, Felipe Cordova, who is now dead, his wife
24 provided evidence that Mr. Ortega was a snitch?

25 MR. CASTLE: Apparently. Also Angel Munoz

1 has passed away as well.

2 THE COURT: Oh, is that his situation?

3 MR. CASTLE: Yes. And, Judge, there is 13
4 of these references that I found in discovery. So
5 this is the first one.

6 THE COURT: 13 that referenced the Ortega
7 murder?

8 MR. CASTLE: Yes, 13 confidential
9 informants who said other people, people other than
10 Billy Garcia committed the murder, and planned the
11 murder.

12 THE COURT: So you're saying that it's
13 exculpatory because Mr. Billy Garcia is not listed
14 there?

15 MR. CASTLE: Exactly. It's contrary to the
16 theory that Robert Lovato had, not to mention the
17 fact that the Robert Lovato is not part of the
18 conspiracy or the discussions to kill Bobby Ortega.
19 So this witness not only says who actually did the
20 murder, but it also contradicts Robert Lovato.

21 And I'll go to another one. We could
22 continue for a little while. But if the Court would
23 like, I could go to another page.

24 THE COURT: All right.

25 MR. CASTLE: 652. This is another CHS

1 confidential informant.

2 THE COURT: And do you know the identity of
3 this one?

4 MR. CASTLE: I might have the wrong page
5 number, Your Honor. Let's go to a different page,
6 663. If we could search for the word Ortega. It's
7 at the bottom of the page here. This indicates that
8 a different informant stated they overheard Mauricio
9 Archie Varela discuss the murders, claimed that
10 Juanito Mendez carried the letter from Estancia to
11 Hobbs with the order to kill Bobby Ortega. And it
12 goes on to the next page. It details other people
13 that were involved with that murder, not including
14 either Mr. Garcia, Billy Garcia, or Robert Lovato.

15 If we could now go to page 2673. This says
16 Billy Cordova, I believe, as the Government's
17 witness -- I'm sorry, Felipe Cordova is the one who
18 ordered the hit on Mr. Ortega, and that Juan Mendez
19 carried the note with instructions to kill Ortega.

20 If we could go to page 13863. This is an
21 FBI report that details information about the murder,
22 and it talks about the fact that this murder is
23 already being prosecuted in Lea County; that an SNM
24 member by the name of Charles Aragon was testifying
25 for the prosecution; that the sources have indicated

1 the hit was ordered by Phillip Cordova; was then
2 carried out by Juan Mendez, Michael Montoya, and
3 Ruben Jinojos.

4 Go to the next page. And Felix Romo
5 assisted by holding Ortega down. And then it goes
6 on.

7 I don't know if the Court needs me to go
8 through all of these. But the problem here is that
9 this is trial by ambush. I've been able to identify
10 13 separate sources that indicate my client didn't
11 have anything to do with this murder. And they're
12 just winging it in here five days before, or six days
13 before trial, without any discovery, without trial
14 transcripts that show what happened in this other
15 trial.

16 How am I to prepare for this, Your Honor?
17 I have no idea how I'm going to prepare for this. I
18 don't know how to get these agents in. I don't know
19 how to find who these CIs are. And I'm entitled to
20 it if it is considered part of their enterprise
21 evidence, which is what they have told me.

22 THE COURT: All right.

23 MR. CASTLE: So I can detail the other
24 pages, or I can file a separate document, which would
25 attach that.

1 THE COURT: Well, is the other 12 going to
2 be that you got 302s talking about the -- or some
3 document talking about the Ortega murder, and it
4 doesn't list Mr. Garcia?

5 MR. CASTLE: Yes. And it talks about
6 confidential informants who haven't been disclosed to
7 the defense, who say that they have evidence that
8 indicates, number one, Mr. Billy Garcia is not
9 guilty; and number 2, that Robert Lovato is not
10 telling the truth by saying he's part of it all. And
11 we have a state prosecution, apparently, I'd like to
12 run down and see whether -- what that's all about.

13 If I could have just a moment, Your Honor?

14 THE COURT: You may.

15 MR. CASTLE: Your Honor, I'm sorry, what
16 you're going to hear this week, in the next two days
17 is a lot of us last minute throwing together items
18 that are derailing everyone's preparations for this
19 trial, whether it's a conflict that's raised at the
20 last minute, or a murder that's raised at the last
21 minute. I'm encouraging the Court to hold the line.
22 We're going to find out in a few minutes that a
23 couple weeks ago another defendant found out they're
24 going to allege five new murders against him as part
25 of the enterprise evidence. It's going to continue

1 to go on, and we're all going to be basically
2 scrambling to defend against allegations that should
3 have been made known to all of us many, many months,
4 if not years ago.

5 THE COURT: All right. Thank you, Mr.
6 Castle.

7 Mr. Castellano.

8 MR. CASTELLANO: Your Honor, this isn't a
9 last minute disclosure. Robert Lovato's Jencks, I
10 believe, was disclosed on January 12, 2018. And as
11 the Court can see from the documents presented to the
12 Court, this murder was discussed early in the
13 discovery, as early as DeLeon 645. We're now in the
14 60,000s in terms of Bates numbers.

15 And the fact that Billy Cordova isn't
16 mentioned, he's not excluded by these people; these
17 people don't say Billy Cordova had nothing to do with
18 it -- or Billy Garcia. They say Phillip Cordova gave
19 the order to Billy Garcia, who passed it on. And
20 that the difference between these CIs and Robert
21 Lovato, is that Robert Lovato is a trial witness, who
22 will say that he committed the murder, and that Billy
23 Garcia ordered the murder.

24 So this is much like the murder last trial
25 by Mr. Baca, who was S related. The victim in that

1 case was an SNM member. Billy Garcia is an SNM
2 member. And Robert Ortega -- or Robert Lovato was
3 also an SNM Gang member. So this is an SNM hit.
4 There is other documentation in the case related to
5 this murder. So this murder is not new news. And,
6 in fact, more than a few months ago, more direct
7 evidence about that murder was presented to the
8 defense attorneys.

9 THE COURT: On the -- did you say that Mr.
10 Ortega was an SNM Gang member?

11 MR. CASTELLANO: Yes, he was.

12 THE COURT: I guess the thing that Mr.
13 Castle is raising the most about is the notice here
14 of the -- under 404(b)(2). Even if the discovery
15 indicated that he -- that this Lovato 302 was out
16 there, how was Mr. Castle to know that this was going
17 to be an issue in this case, since it's not on the
18 302 letter -- or on the bad acts letter?

19 MR. CASTELLANO: Well, the bad acts letter,
20 I don't think, can cover every single act in this
21 case. One of the reasons they ask for bad acts was
22 for purposes of 404(b). This is evidence which
23 proves the elements in this case. It's not 404(b).
24 As a matter of fact, all the things we've discussed
25 this morning regarding Mr. Garcia are not 404(b).

1 These are just acts that we presented to them. And I
2 think what's happened is there has always been
3 confusion because people refer to these as bad acts.
4 These aren't bad acts pursuant to 404(b). These are
5 racketeering acts.

6 THE COURT: Well, we did that, though,
7 instead of allowing the Government to just decide
8 whether things were 404(b) or racketeering, to give
9 the defendants an opportunity to challenge that.
10 This one, I tend to agree with you, is probably going
11 to be more of an enterprise. But would the
12 Government be willing, or has it already identified
13 all the CHs that are in these 12 302s, or Government
14 documents, that don't list Mr. Garcia, would you be
15 willing to disclose those?

16 MR. CASTELLANO: Yes, Your Honor. And if
17 the defense gives us the Bates stamp numbers that can
18 focus us on those pages and those people. My
19 understanding this morning is that -- and I will
20 confirm this -- that the person in DeLeon 645
21 referred to is likely Leroy Lucero. So we'll start
22 there. But, yes, if they point us to those pages, we
23 will look for those pages. And if we find additional
24 pages, we will also disclose that information.

25 THE COURT: What about the trial, the

1 Ortega trial, what do we know about it?

2 MR. CASTELLANO: I know less about the
3 trial itself. I know that Robert Lovato was guilty
4 of that crime. And there were other people also
5 implicated in that crime. So he's been found guilty
6 of it. And he will testify to that effect, and he
7 will testify that Mr. Garcia ordered that hit, or was
8 one of the people that ordered that hit.

9 THE COURT: So Mr. Lovato was convicted.
10 Was he the only one convicted of the Ortega murder?

11 MR. CASTELLANO: No, I believe there were
12 others, Your Honor.

13 THE COURT: And this murder occurred in
14 1990?

15 MR. CASTELLANO: 1999.

16 THE COURT: 1999.

17 MR. CASTELLANO: So two years before the
18 Castillo and Garza murders. And it's similar in
19 that, once again, Mr. Garcia was not directly
20 involved in the murders, but is alleged to have
21 ordered the murders. So it's very similar conduct,
22 and it's still racketeering and enterprise evidence.

23 THE COURT: When do you think that Mr.
24 Lovato is going to show up as a witness for the
25 Government? Where in this trial?

1 MR. CASTELLANO: We're going to try to
2 check a quick order here, Your Honor. If you give me
3 a moment, I'll try to give you at least a basic
4 estimate.

5 THE COURT: While you're looking for that,
6 what do you think we're going to find as far as a
7 1999 trial? Is the State going to still have those
8 records? Is there going to be much still there?
9 What's your experience with that?

10 MR. CASTELLANO: I would be somewhat
11 surprised if those documents were still there. I
12 know from time to time in the Bar Bulletin, not in
13 terms of docket entries, but the courts normally do
14 put out notice that they will be destroying evidence
15 and things of that nature, after a certain number of
16 years.

17 THE COURT: Was that tried down here in Las
18 Cruces?

19 MR. CASTELLANO: I think the murder
20 occurred in Hobbs, so it was probably in the eastern
21 part of state. We can check those records. We can
22 also see if it's possibly in Mr. Lovato's prison
23 file, see if there are documents in there.

24 THE COURT: Has Mr. Lovato's prison file
25 been turned over?

1 MR. CASTELLANO: Yes. It should have been
2 disclosed already. And I'll verify that as well.
3 But the witnesses' disciplinary files, and things of
4 that nature, and pen packs that have actually been
5 created should be -- should have been turned over.

6 THE COURT: Do you have an approximate
7 estimate as to when he's going to be your witness?

8 MR. CASTELLANO: Right now I'm checking the
9 tentative order right now, Your Honor.

10 Your Honor, we could probably put him on in
11 possibly the third week of trial. Maybe later. That
12 would give us an additional three weeks before the
13 defense sees him.

14 THE COURT: Would you also agree not to
15 mention him in openings or this murder for a while?

16 MR. CASTELLANO: We would, Your Honor. We
17 could exclude that from opening statement. That way,
18 the jury would not have heard anything until the
19 Court has more time to digest it.

20 THE COURT: All right. I guess, Mr.
21 Castle, I tend to agree, this probably -- I know
22 we've got the 404(b) list, and we know why we came up
23 with that list. But it sounds to me like it's
24 enterprise and racketeering activity, or activity in
25 advancing the enterprise. And you are going to get

1 names of the CHs; you're going to have some time to
2 explore it. The trial file is equally available to
3 both of you. And the Government is going to give you
4 what they do have. It seems like there is not much I
5 can do on this. It's not something that necessarily
6 should have been disclosed. If you come across
7 something that indicates otherwise, then it will give
8 us some time to digest it.

9 MR. CASTLE: Your Honor, it absolutely is.
10 Because if it's part of the enterprise evidence, it's
11 part of evidence they're going to use at trial, Rule
12 16 indicates the Government must permit defendant to
13 inspect and/or to copy papers, documents, et cetera,
14 that's in the Government's possession or control, if
15 it's going to be material to preparing the defense or
16 intends to use it in their case-in-chief at trial.
17 How do you prove a murder without --

18 THE COURT: What do you think they have
19 that they haven't disclosed yet?

20 MR. CASTLE: Everything about the murder.
21 Everything. Other than a couple of CIs that said
22 different people committed the murder, I have
23 nothing.

24 THE COURT: But what is it that you think
25 they have?

1 MR. CASTLE: I'm sure they have a dead
2 body. I'm sure they have an autopsy report. I'm
3 sure they did fingerprints, DNA, and all the kinds of
4 things that normally happen in a homicide case that
5 are required to be done by Rule 16. They have to
6 have some examinations and tests that are required by
7 Rule 16, or they should have had. This is no
8 different than the exact murders that Mr. Garcia is
9 charged with. It's part of elements of the offense.
10 And they're putting this on, and they haven't
11 disclosed it.

12 THE COURT: Well, isn't the only thing they
13 have is Mr. Lovato testifying that Mr. Garcia ordered
14 the hit. And the rest would be, most likely, in the
15 State's possession, would it not?

16 MR. CASTLE: Yes. But they have an
17 obligation, not only under Rule 16, but under the
18 Constitution to look for exculpatory information
19 concerning the allegations that they're alleging
20 against my client. They have not represented here at
21 all today that they've looked for and disclosed
22 exculpatory information concerning the Ortega murder.
23 I've noticed that. They purposely avoided that.
24 They have not said that they have fulfilled any of
25 their constitutional obligations in regards to that.

1 So even if it's not in their possession, they have an
2 obligation to go and get it.

3 THE COURT: Well, really? I mean, if it's
4 in the possession of the State -- I guess I have
5 looked at these Rule 16 and Brady and Giglio many
6 times, and I don't recall it putting a burden on the
7 Government to go to other state agencies and find
8 that material.

9 MR. CASTLE: Well, then I guess they can't
10 call any of them as witnesses. You know, if they're
11 not going to put on a pathologist, which I noticed
12 there is no pathologist that I know of that is listed
13 on their will call list concerning the death of Mr.
14 Ortega. None of the people, other than Mr. Lovato,
15 who were apparently involved in that, are listed.

16 This is trial by ambush, Judge. I don't
17 know how else to do it. And I can't even do an
18 interview with a single one of these people in the
19 five days left. I'm going to be giving them a list
20 of CIs. They're going to tell me where they are.
21 And we're going to have to go wing it?

22 And I have a right to make an opening
23 statement that covers what's being alleged against my
24 client. They may refrain from it. But I have a
25 right. My client's going to have to face an

1 allegation of another murder, and I don't say
2 anything for the jury at all about it, then I'm
3 hiding from it. And the jury is going to know that.
4 Why didn't you talk about Mr. Ortega? You know,
5 that's what's going to go through their mind. Why
6 didn't you talk about it? And I can't talk about it
7 because I don't know anything really about it.

8 I looked through Mr. Lovato's disciplinary
9 history, okay? It doesn't have the records that
10 they're talking about. And perhaps they can show it
11 here on the screen. I haven't had that much time.
12 Literally, this is the morning -- right before the
13 morning break I'm being told to defend a murder
14 allegation. I don't know how anybody can say that's
15 fair, Your Honor.

16 And it is being used to prove an element of
17 the offense. So it is the same as the other aspects
18 of the indictment, including the allegations in 2001.
19 And if they were to have said to you, Your Honor, I
20 am now telling you on five days before trial, that
21 the 2001 murders, that was investigated by the State,
22 and we didn't turn over anything, we haven't given
23 them the autopsy reports. We haven't given them any
24 physical evidence. We haven't even let them go look
25 at any of the physical evidence, because they didn't

1 know about it, if they were to say that, I would
2 think this Court would be issuing sanctions and have
3 problems. It is the same as any other element. And
4 they have the obligations under Rule 16 and the
5 Constitution to seek out and present this information
6 to us.

7 I would tell the Court right now that I
8 showed the Court one document. I believe the witness
9 that we showed the Court at 13863, Charles Aragon,
10 who testified for the prosecution, in the prosecution
11 of, I believe it was Phillip Cordova; apparently it's
12 now also Mr. Lovato. We don't have his statements.

13 And I would note the Court can look at
14 this -- if you could switch back to the overhead.
15 The Court has found that where the federal government
16 has worked with state officials, that they have an
17 obligation to disclose. This is -- I'm going to
18 scroll to the top -- this is an FBI report with Trent
19 Pedersen, back in 2001, where they were dealing with
20 these homicides. And the reason I'm showing this
21 Court is we read this, and they talk about -- I
22 apologize, I'm scrolling too fast -- they talk about
23 Rolando and Frank Castillo homicide. So we're on
24 notice. We read about it. We defend against it.

25 Then we go down to Bobby Ortega. Nothing

1 is mentioned about Billy Garcia. But the FBI here,
2 this is part of their investigation, they're looking
3 at all the murders, including the Bobby Ortega
4 murder. So it's a joint task force -- the Court had
5 heard evidence, on a joint task force of state and
6 federal officials looking into the SNM and their
7 activities. So that's where this comes up.

8 We don't have any reports of Charles
9 Aragon's statement. We don't have any documents. So
10 I believe this Court had indicated in early parts of
11 this case that it was extending the Government's
12 obligations to those state officials that it was
13 working with in these joint matters. And there was a
14 joint task force. So their obligations did extend to
15 this.

16 THE COURT: Well, I certainly said that
17 about the Corrections Department. And then about
18 task forces, I believe the Government is
19 participating in those and has an obligation to go
20 look and search those as well. Just me reading this
21 right here is suggesting that it's being prosecuted
22 by state authorities, I'm not sure that there is in
23 anything that's really -- the federal government is
24 involved in that prosecution.

25 MR. CASTLE: I would point out that the

1 federal government is corrections sources that are
2 advising them about the Ortega murder. So that
3 murder apparently happened inside the Corrections
4 Department. And the fact that the State may have
5 also prosecuted it, doesn't change the fact that it
6 was -- that the FBI was working with State
7 corrections and the State Corrections has provided
8 information concerning that hit.

9 Like I said, I'm winging this, Judge. I
10 don't have the documents.

11 THE COURT: Let me ask Mr. Castellano. I
12 mean, I certainly think -- and I think you would
13 agree -- that the obligation is to look for evidence
14 that the federal government possesses, no matter what
15 federal government agency has it. And I think I've
16 already said the obligation doesn't extend to going
17 out and searching for additional evidence outside of
18 its possession. Then we came up with these rules for
19 the Corrections Department and some of the task
20 forces.

21 Is there anything else that you need to go
22 look for from any federal government agency,
23 Corrections Department, or task force, that's going
24 to have any information about the Ortega murder that
25 you haven't already looked at and produced?

1 MR. CASTELLANO: Not that I can think of,
2 Your Honor.

3 And Mr. Castle has made a point this
4 morning with the other documents he already has in
5 his possession. So those are documents, some of them
6 from the Corrections Department and other sources,
7 that provide him impeachment information that he
8 already needs. So that would be considered
9 impeachment, and possibly Brady or Giglio
10 information. He's already highlighted that for the
11 Court this morning. He already has that in his
12 possession, and those have already been disclosed to
13 him.

14 So in terms of us getting the records and
15 things of that nature from the Corrections
16 Department, he has those. He showed those to the
17 Court this morning.

18 THE COURT: Well, I just remind you of your
19 obligations. If it's a federal government agency or
20 if it's in the Corrections Department or a joint task
21 force, you've got to look at it with the Rule 16,
22 Brady-Giglio on. And if you say you've already done
23 that and produced everything, then I'll have to take
24 your word for it. But you really might want to use
25 this additional time to double-check, and make sure

1 something doesn't pop up. And you made some
2 representations about what you'll do to give
3 additional information today.

4 MR. CASTELLANO: And I agree, Your Honor.
5 And I don't want anyone to be surprised by additional
6 information. So we will make use of that time to
7 make additional inquiries. But like I said, Mr.
8 Castle has documents in his possession, indicating
9 they've already been disclosed.

10 THE COURT: And is about all your proof
11 going to be is you're just going to put Mr. Lovato
12 on, that's about it? No forensics? No pathologist,
13 or anything like that? It's just going to be
14 Mr. Lovato?

15 MR. CASTELLANO: That's correct, Your
16 Honor. And probably his judgment related to that
17 conviction.

18 THE COURT: Oh, yeah, okay. And I guess,
19 as far as the opening statements, you know, the
20 Government is somewhat gagged. I mean, you can
21 wait -- I know you probably don't want to, given what
22 you told me earlier -- wait to do your opening. But
23 it seems to me you know what they're going to say.
24 You may not know exactly everything you want to say,
25 but you know what they're going to say at trial about

1 this murder.

2 MR. CASTLE: Yes, Your Honor. I'll address
3 that. But I also want to show the Court another
4 matter.

5 I have a right in my opening statement to
6 say what I believe my case will be. I won't be able
7 to do that regarding that murder, because I will not
8 be in a position where I can, in any manner, make any
9 representations about what evidence we'll put on or
10 not put on, concerning that murder. I will not be in
11 that position.

12 So the reason we're here is not because of
13 anything we did wrong, because the Government hasn't
14 turned over.

15 They told you just a few minutes ago that
16 those materials were likely all in Mr. Lovato's
17 corrections file. I'm showing on the screen Mr.
18 Lovato's corrections file that we were given. It's
19 15 pages long, 15. And it mentions nothing about
20 this murder at all. And I can scroll through it.
21 But it starts at page 25699. And there are the
22 offenses, adjustment history. Nothing about killing
23 anybody. That's it, Judge. Scroll through it, they
24 have some discussion about these mild "refusing
25 lawful orders," or using bad words, and things like

1 that. Nothing about the Montoya (sic) murder.

2 THE COURT: Ortega.

3 MR. CASTLE: Sorry. Ortega murder.

4 THE COURT: But I guess I'm struggling to
5 see what the Government has done wrong. I mean, I
6 guess that's where I'm not getting the connection is,
7 I'm not seeing that they've done anything wrong.

8 MR. CASTLE: They haven't told us that they
9 have looked for any exculpatory information
10 concerning that murder and turned it over for the
11 defense.

12 THE COURT: Well, I guess I thought that
13 was the representation I got from Mr. Castellano.
14 Isn't it, Mr. Castellano?

15 MR. CASTELLANO: Yes, Your Honor. I
16 indicated that Mr. Castle has documents, which he
17 showed to the Court this morning, indicating that he
18 could impeach Mr. Lovato by the fact that Mr. Garcia
19 is not mentioned by other people. So there is
20 evidence he already has in his possession. And we
21 will make additional inquiries, but like I said, he's
22 actually highlighted to the Court documents which
23 don't mention his client. And those were disclosed
24 by the Government.

25 THE COURT: And I guess if something pops

1 up, I'll have to reevaluate this. But right at the
2 moment, I'm just not seeing what the Government has
3 done wrong.

4 MR. CASTLE: He carefully worded that, Your
5 Honor. He didn't answer your question. He didn't
6 answer whether they looked for exculpatory
7 information. He just said there has been some
8 inculpatory information that has been disclosed.
9 He's not said that they looked for it.

10 THE COURT: Let me put it in my words.
11 He's just disclosed everything, so that there is not
12 anything more to kind of go look at. Am I doing
13 it -- am I saying it right?

14 MR. CASTELLANO: That's correct, Your
15 Honor. If we had it, we disclosed it. That's why we
16 have over 60,000 pages of discovery in this case.

17 MR. CASTLE: They have an obligation to go
18 out and locate and produce exculpatory information.
19 Not just what is in their possession. They have an
20 obligation to obtain it and to distribute it. And if
21 they're going to allege in a federal indictment of
22 other crimes, such as a murder, they have an
23 obligation under Rule 16 to give us materials.

24 Also, I -- maybe I'm the one that's not
25 understanding. But they haven't given us anything

1 but a few snippets from CIs that haven't been
2 disclosed. I mean, the fact that they haven't
3 disclosed it up until five days before trial, in and
4 of itself, is a violation, because they know that if
5 they have a CI that provides exculpatory information
6 to a defendant, they have an obligation to turn that
7 information over to the defense under the Roviario
8 decision. They haven't done that. And they waited
9 so that we will be prejudiced.

10 THE COURT: Let's do this: You're going to
11 get all the names of the CIs, but it seems to me
12 they've all been disclosed. I could be wrong. There
13 may be some they haven't disclosed. And if that's
14 the case, we'll reevaluate it.

15 MR. CASTLE: What's interesting is they
16 gave the Court one example, which is page 645, and
17 said that was Leroy Lucero. We have a letter from
18 the Government that was distributed to all
19 defendants, that Trial 1 relied on, and all of these
20 defendants relied on, which indicates which pages
21 relate to which informants. And 645 is not indicated
22 as Leroy Lucero. So now we have a new statement by
23 Leroy Lucero, supposedly. I'm not sure it is Leroy
24 Lucero. But we'll have to take a look at that. But
25 once again, that's another problem. So I'm not

1 accepting that representation, that all these people
2 have been disclosed, because when I went through
3 those page numbers in the 13, the only reason I
4 brought them up is because I quickly indexed it
5 against their disclosure. And all those 13 people,
6 page numbers are not referenced in their CI
7 disclosure document. So these are all people that
8 have never been disclosed. Now, they might be
9 duplicates. I don't know. I didn't have time to go
10 through and analyze it.

11 But I could tell the Court we're definitely
12 in a situation where they have not disclosed
13 exculpatory information. And frankly, I'm going to
14 probably run this stuff down. Some of these people
15 might be dead, and we'll have to file another motion
16 to dismiss, and have the Court hear it again in the
17 midst of this hearing, in the midst of the trial.

18 THE COURT: All right. Well, for the time
19 being, I won't pretrial exclude it. You'll need to
20 probably do some work on this, and the Government has
21 got some work it needs to do. And then I'll just
22 have to reevaluate it depending on what shows up. At
23 least at the present time, I'm not seeing any reason,
24 sound reason, to exclude it from trial.

25 MR. CASTLE: Your Honor, I'd be remiss if I

1 didn't at this point in time move for a continuance
2 because of our inability to represent and defend our
3 client on one of the three murders that are being
4 alleged in this case, the third of which was alleged
5 for the first time today. So we are moving for a
6 continuance so we can prepare for trial.

7 THE COURT: All right. Thank you, Mr.
8 Castle. I won't grant that at the present time, but
9 I'll deny it without prejudice to being renewed.

10 All right. So what I have next to go to is
11 what has been, I think on our charts, marked as
12 number 17, which is the -- Mr. Arturo Garcia's
13 alleged bad acts. Mr. Blackburn --

14 MR. BLACKBURN: Judge, I spoke to the
15 Government. Could we ask that you move that down for
16 a little bit?

17 THE COURT: All right. Is that all right
18 with everybody? Are y'all going to talk about it
19 some more, is that --

20 MR. BLACKBURN: Yes, amongst other things,
21 obviously.

22 THE COURT: All right. So we'll move that
23 down.

24 So then the next one I have is Christopher
25 Chavez' bad acts. Where are we on that?

1 MR. GRANBERG: Your Honor, we had discussed
2 this at the last hearing.

3 THE COURT: And my pages are all marked up.
4 Do you think we've covered everything?

5 MR. GRANBERG: I thought we did, Your
6 Honor.

7 MS. ARMIJO: Yes, Your Honor. You ruled on
8 everything as to that.

9 THE COURT: All right. Some stuff was just
10 given back to me because Ms. Wild may not have known.
11 But I'm looking at Document 1531-1. I have pretty
12 extensive notes on there. I recall the colloquy that
13 we had with each other.

14 All right. So then I'll go to Mr. Joe
15 Gallegos' motion in limine on 404(b). Where are we
16 on that one? I don't see this sort of marked up
17 notes on that one that I had.

18 MS. ARMIJO: Your Honor, I believe while
19 Mr. Benjamin is going up, we did meet in person and
20 discussed this one, and said we've narrowed it down,
21 and we can go over all of that. There are a few
22 discrete acts.

23 THE COURT: Okay.

24 MS. ARMIJO: I think we knocked out
25 everything on the first page.

1 THE COURT: Let me pull the page up. All
2 right. So this is your letter of May 22, 2017, so
3 everything on the first page is out?

4 MS. ARMIJO: Correct, Your Honor.

5 THE COURT: All right.

6 MS. ARMIJO: Then I believe the first one
7 would be the March of 1995.

8 THE COURT: Okay. So the very first one at
9 the top of the page is in?

10 MS. ARMIJO: Correct.

11 THE COURT: All right.

12 MS. ARMIJO: It's the "Joe Gallegos
13 participated in recorded telephone calls with Rosanne
14 Perea regarding drugs."

15 THE COURT: All right. We've done this a
16 little bit with different -- we've done this with
17 different defendants. I assume the purpose of this
18 is to establish that Mr. Joe Gallegos does drugs,
19 which is something that has been important for your
20 proof as to activities that the SNM Gang does?

21 MS. ARMIJO: Correct, Your Honor. And what
22 I was going to say -- I think we discussed it with
23 other defendants in general -- is that we will have
24 several cooperators coming in and testifying as to
25 Mr. Gallegos, either providing him drugs or being

1 involved in drugs. This particular one I believe is
2 a call, and that's why we have it in particular. But
3 we have numerous witnesses that would come in and
4 testify to that extent. And so I guess we would just
5 ask that we would do that as well.

6 And if it became -- I believe with the last
7 one, which may have been Mr. Chavez, I'm not really
8 sure -- but the Court had indicated that if, you
9 know, we felt it was being cumulative, or you know,
10 just too much information, then the Court would
11 consider at that time limiting it. But we certainly
12 do have witnesses that would be testifying as to when
13 they were incarcerated with Mr. Gallegos, his drug
14 activities.

15 THE COURT: Yeah. Just looking through
16 this list, it looks like a lot of them are drug
17 activities. I'm wondering if rather than trying to
18 prove particular ones, like the March 1995, or the
19 August 4, 1995, or -- my eyes are just going down the
20 list -- October 15, 2000, October 15, 2000, February
21 27, 2001 -- if the Government were to just put that
22 in, put that evidence in, you didn't contest that he
23 was a drug user involved in drug trafficking in and
24 out, could we maybe then dispense with all the
25 individual incidents?

1 MR. BENJAMIN: I think that's one option,
2 Your Honor. My concern is that, as of 2005, the New
3 Mexico Department of Corrections lists Joe Gallegos
4 as a nonvalidated member of the SNM.

5 And so I think it comes -- the reliance on
6 all the drug use and everything needs a foundation
7 first. I'm not willing to just agree that they get
8 to use drug evidence for character evidence or such
9 prior to them establishing that Mr. Gallegos is an
10 SNM member.

11 THE COURT: Do they have him validated
12 after 2005?

13 MR. BENJAMIN: No, Your Honor.

14 THE COURT: Do they have him validated
15 before 2005?

16 MR. BENJAMIN: No, Your Honor. They're
17 going to have somebody come in, I believe, and say
18 that Mr. Gallegos is an SNM member, or some such. I
19 guess the issue becomes what that date is.

20 THE COURT: Let me ask Ms. Armijo: What
21 would be your starting point for proof that Mr.
22 Gallegos was part of the SNM Gang?

23 MS. ARMIJO: Well, he certainly was part of
24 the SNM Gang on or before 2001. I'd have to go back
25 and look at my notes to see what different witnesses

1 would say. But we do have witnesses that will say he
2 is an SNM Gang member, and his first murder did occur
3 in 2001. So at least as of that time he was. And
4 I'd have to go back and -- yes, as we know from the
5 last trial, Mr. Sanchez was not a validated gang
6 member. We had lots of testimony as to him being a
7 leader in the gang. So this is somewhat analogous to
8 that. We have numerous people who will put him as an
9 SNM Gang member.

10 THE COURT: I guess this is what I would
11 propose to do is -- it kind of depends on your
12 strategy, how you want to attack these people. If
13 you're not going to really attack them on the fact
14 that he's bringing in drugs and those sort of things,
15 then I would probably resist the Government bringing
16 in specific instances. We don't need them. If he's
17 a drug user, and he's used drugs and he brings in
18 drugs and traffics in them, then we don't need to
19 have specific instances.

20 On the other hand, if that's going to be a
21 focal point -- and then, as far as the Government is
22 concerned, they're going to have to establish if
23 they're going to go the 404(b) -- I'll call it
24 that -- although, I think these are a little bit
25 different -- we're going to go that route, then

1 they're going to have to establish when they're going
2 to say he was a member of the SNM Gang. And probably
3 drug use, or 404(b) activity before that date would
4 not be in. And that afterwards, then it would, I
5 would probably allow it in. Does that make sense?

6 MR. BENJAMIN: It does, Your Honor. And I
7 don't think it will be a surprise, there is going to
8 be testimony regarding Mr. Gallegos' drug use
9 specifically in the Burns murder. But so -- I don't
10 have an issue with that.

11 What I do have an issue is just the
12 glossing over of everything and alleging that
13 everything is -- and that was the way that I
14 understood the Government was going to try to do it,
15 all these acts, because they're drugs are therefore
16 SNM connected. So I think what the Court is
17 proposing is certainly fine. Once the Government has
18 put somebody on that talks about SNM, and
19 specifically regarding Joe.

20 THE COURT: As a starting point.

21 MR. BENJAMIN: Yes, Your Honor.

22 THE COURT: Can you live with that, Ms.
23 Armijo?

24 MS. ARMIJO: Yes, Your Honor. I think
25 that's the way we've been operating, and that's the

1 way we plan on operating.

2 THE COURT: Okay. So I won't necessarily
3 preclude these. But approach the bench before you
4 try to get in the specific acts of drug use. And,
5 otherwise, we'll see if it works out as it has with
6 other defendants. And if it does, then I won't
7 allow, then, specific instances other than what is
8 necessary for the 2001 alleged murders.

9 MR. BENJAMIN: I'll preserve the objection
10 at that time, Your Honor.

11 THE COURT: Okay.

12 MR. BENJAMIN: Two concerns that I have, I
13 think -- and Ms. Armijo didn't, I believe, whittle
14 this down immensely -- but the next one, if the Court
15 would go to the second page, "On or about December 8,
16 1996, Joe Gallegos bribed and intimidated a witness."

17 THE COURT: All right. So the next three
18 are out; is that correct, Ms. Armijo?

19 MS. ARMIJO: Yes, Your Honor.

20 THE COURT: All right. So we're now at "On
21 or about December 8, 1996?"

22 MR. BENJAMIN: Yes, Your Honor. And Your
23 Honor, I have a judgment for that, I've talked to my
24 client about that. I don't think that this is, once
25 again, there is not going to be any foundation to

1 show that this is an SNM act, other than their
2 general idea that any violent crime is an SNM act.
3 Because this involved a family member.

4 So there is going to be -- I think, in
5 doing the research now, there is going to be an issue
6 regarding whether that's an act that involves a
7 family member, or whether it's an issue regarding the
8 SNM Gang. And I think that they're going to have an
9 extremely high burden -- and this was something that
10 happened in El Paso -- where they're trying to link
11 gang members in separate acts based upon gang members
12 versus bad acts that occurred between -- in support
13 of a family member. Did I make sense with that, Your
14 Honor? It sounded like I was talking in circles.

15 THE COURT: I think I understand what
16 you're saying. I think we've seen this issue before.
17 So let me see what Ms. Armijo has to link this with
18 the SNM enterprise. Is that your point?

19 MR. BENJAMIN: Yes, Your Honor, versus
20 familial.

21 THE COURT: Just a family dispute.

22 MS. ARMIJO: And Your Honor, as to this
23 specific incident, I don't know that we would say
24 necessarily this incident is -- if it's family,
25 necessarily that it is SNM. But if it is an SNM, I

1 will say that it's 404(b) in particular, given the
2 fact that he's charged with witness intimidation.
3 That's one of the charges that he's facing in regard
4 to Jose Gomez. And so to that extent, it might be
5 relevant to that.

6 MR. BENJAMIN: And I would come back -- and
7 the Court can guess -- that would be extremely
8 prejudicial to use a 1996 act to support what would
9 be described as a very weak witness intimidation act.

10 THE COURT: Yeah. I'd be a little
11 concerned just about the distance.

12 MS. ARMIJO: And Your Honor, at this time,
13 why don't we -- can we just hold this one in
14 abeyance?

15 THE COURT: Well, I think that's probably
16 what I'm going to say is, unless you're able to link
17 it up more strongly with SNM, I'll probably keep it
18 out. I won't -- I'll do it without prejudice, that
19 if you can show me some better link. But if it's
20 just a family member -- and I tend to agree with Mr.
21 Benjamin, that if it's going to be right on point
22 here, it really does begin to be the most prejudicial
23 kind of evidence. So I'd be inclined to keep that
24 one out.

25 MS. ARMIJO: All right, Your Honor.

1 Agreed.

2 MR. BENJAMIN: Your Honor, and as I said,
3 Ms. Armijo pared this list down.

4 The next one was a drug one, "On or about
5 March 19, 1997," introducing heroin, and so I think
6 that we can move -- go with that, and the Court --

7 THE COURT: Okay. January 16, the next one
8 is out, and then the next one that's in, March 19, we
9 can treat it like the other drugs?

10 MR. BENJAMIN: Yes, Your Honor.

11 THE COURT: Does that work for you?

12 MS. ARMIJO: Yes, Your Honor.

13 THE COURT: All right.

14 MR. BENJAMIN: April 14, 1997, I was going
15 to list them, because there is quite a few between
16 the next one that they're proposing, which is another
17 drug offense, Your Honor. But April 14, 1997, May
18 22, 1998, April 6, 1999, July 23, 1999, October 15,
19 2000, and October 15, 2000 are all out.

20 February 27, 2001 is a drug one, and we've
21 just essentially asked, like the Court had proposed,
22 to approach, and determine where we are in evidence
23 at that point in time.

24 THE COURT: Okay. Was the -- I'm sorry,
25 was the April 14, 1997, were we going to treat it

1 like we were the other drugs, or was it just totally
2 out?

3 MR. BENJAMIN: That was out, Your Honor, is
4 what Ms. Armijo told me.

5 MS. ARMIJO: Well, Your Honor, I think it's
6 out, like we're not planning on bringing in the
7 urinalysis test.

8 THE COURT: So we're going to treat it like
9 a drug offense?

10 MS. ARMIJO: Correct. I think that, in
11 general, all the drug offenses, as long as we're
12 allowed to, we're planning on doing like we did with
13 the other cases, and as we mentioned before. So to
14 the extent that there is individual things, we're not
15 planning on presenting it.

16 THE COURT: Okay.

17 MS. ARMIJO: Anything listed here, I think
18 we could, in general, do that. And if for any reason
19 that changes, we, of course, would approach the
20 bench. But that's how we would plan to proceed with
21 drug usage.

22 MR. BENJAMIN: And, Your Honor, my
23 objection would be usage is not a RICO Act. And so
24 there are enumerated acts under the RICO. And
25 conspiracy to transport I know is one, but possession

1 is not, or use is not. And so --

2 THE COURT: I think it's probably going to
3 be out. But it kind of depends on what you argue. I
4 mean, if you surprise Ms. Armijo and say he never
5 used drugs, then --

6 MR. BENJAMIN: I can promise the Court that
7 that won't come up.

8 THE COURT: So it's probably out. The May
9 22, 1998 is out; is that correct, Ms. Armijo? April
10 6 is out. July 23 is out. October 15 is out. Then
11 the next one is -- the next October 15 is a drug one,
12 so we'll treat it like the drug one. Then February
13 27 is another drug one, and we'll treat it like a
14 drug one. Is everybody in agreement on those?

15 MS. ARMIJO: Yes, Your Honor.

16 MR. BENJAMIN: Yes, Your Honor.

17 THE COURT: Is the next one, then, on March
18 9, is that another intimidation of a witness? Is
19 that one in or out?

20 MS. ARMIJO: And, Your Honor, that one --

21 MR. BENJAMIN: I was told that that was
22 out, Your Honor.

23 MS. ARMIJO: Out.

24 THE COURT: That's out?

25 MS. ARMIJO: Out.

1 THE COURT: Okay. So then we're down to
2 January 25. Is that one in or out?

3 MS. ARMIJO: Out.

4 THE COURT: Out. What is the next one
5 that's in? Maybe I'll --

6 MS. ARMIJO: The last one that's in, but
7 it's really not a bad acts, it's just statements by
8 the defendant, is that there is a recorded call with
9 Shauna Gutierrez. And Shauna Gutierrez is going to
10 be a witness in this case.

11 THE COURT: Okay.

12 MS. ARMIJO: They're just statements.

13 THE COURT: So the September 25 is out.
14 Shauna Gutierrez statements are in. Is that your
15 understanding as well, Mr. Benjamin?

16 MR. BENJAMIN: I would use the term "will
17 be offered," Your Honor, but --

18 THE COURT: Certainly.

19 MR. BENJAMIN: I'm just being --

20 THE COURT: Anything at this time I can
21 help you with, or we're going to have to take
22 those --

23 MR. BENJAMIN: We're going to have to take
24 those up at a time -- I'm planning on briefing
25 something on some of those issues.

1 THE COURT: Okay. Do y'all want to educate
2 me a second on Ms. Gutierrez? Is she going to be
3 here and testify?

4 MS. ARMIJO: Yes, Your Honor.

5 THE COURT: So she has a cooperation clause
6 in her plea agreement?

7 MS. ARMIJO: She has an addendum that I
8 believe should have been disclosed. If it wasn't, it
9 will be disclosed this week.

10 MR. BENJAMIN: And correct me if I'm wrong,
11 but you're going to disclose a proffer from the 29th
12 this week in the notes?

13 MS. ARMIJO: Yes.

14 THE COURT: All right. So we'll just have
15 to take those -- those are recorded phone calls. All
16 right. So we'll just have to take those as they come
17 up, Mr. Benjamin?

18 MR. BENJAMIN: Yes, Your Honor.

19 THE COURT: Anything else, then, on your
20 bad acts?

21 MR. BENJAMIN: I think they're going to say
22 that there was another issue that we discussed, and
23 it's an individual by the name of Matt Lucero, Your
24 Honor. And it deals with five murders that they're
25 going to -- I believe, allege are the RICO acts. And

1 if I could ask the Court --

2 MS. ARMIJO: I sent him an email. We're
3 not going to call him.

4 MR. BENJAMIN: Oh, I'll withdraw that.

5 THE COURT: So he doesn't have the same
6 problem Mr. Castle does?

7 MS. ARMIJO: No, he does not.

8 MR. BENJAMIN: I didn't see that email
9 among the many thousands I've had. I apologize.

10 THE COURT: Anything else, Mr. Benjamin, on
11 your 404s?

12 MR. BENJAMIN: No, Your Honor, that cleaned
13 it up very nicely.

14 THE COURT: All right. Let me get my
15 documents in order here.

16 All right. So I am now going back to -- I
17 think we're going back -- is this now where we've
18 picked up Billy Garcia's motion to dismiss? Is this
19 where we pick up this issue?

20 MS. ARMIJO: Before we get to that issue,
21 Ms. Harbour-Valdez and I would like to address the
22 Court on some questions that we had in reference to
23 jurors, so that we can get people behind the scenes
24 working on that.

25 THE COURT: Okay.

1 MS. HARBOUR-VALDEZ: Your Honor, we had
2 filed joint stipulations, several documents, Document
3 1981, 82, 90, 91, and then this week we filed three
4 supplemental joint stipulations based on emails and
5 correspondence we've received from Ms. Bevel. I
6 believe we'll be filing another one this morning
7 based on four more letters that came in. We were
8 just wondering when the Court might have an answer,
9 so that we could get our folks --

10 THE COURT: I think, by and large, if y'all
11 have been agreeing on these people, they've been
12 taken out.

13 THE CLERK: That's correct, Your Honor.

14 MS. ARMIJO: Okay.

15 THE COURT: I spent Wednesday night on the
16 document that I filed on Wednesday night, where there
17 was disagreements on that. And I might just say on
18 this -- and I'm not trying to interfere with
19 anybody's challenges to these people, but what I
20 noticed in looking through those things, the
21 defendants were taking a fairly hard line position
22 with hardship. The Government was making more
23 hardship. I didn't want to interfere with the
24 defendants' strategy, if you've got a jury consultant
25 and they're telling you that person is a great juror

1 and the Government is trying to knock it out on
2 hardship, I took a little bit of a hard line. I
3 wasn't necessarily trying to signal to anybody that
4 if everybody agreed that those people should be
5 tossed out that I wouldn't go along with it. So I
6 say that more for the defendants' benefit. I didn't
7 want to the necessarily -- you know, if I have to
8 tell jurors they've got to be here -- because the
9 defendants may have identified those people as people
10 that fit your profile and you want them there. I'm
11 going to probably go to pretty good lengths to just
12 tell people they'll have to do their civic duty. But
13 if y'all agree with the Government that some of those
14 should be tossed out, then I will also probably go
15 along with them, even though in my order I'll
16 overrule any hardship objection. Am I making myself
17 somewhat clear?

18 MS. HARBOUR-VALDEZ: I think so, Your
19 Honor. So we can assume that all the ones we've
20 agreed on have been removed, and we can get started?

21 THE COURT: I think so.

22 THE CLERK: They've been pulled out.

23 THE COURT: I haven't been going back and
24 undoing those, so I've just been ruling on the ones
25 where y'all couldn't agree.

1 MS. HARBOUR-VALDEZ: Okay.

2 THE COURT: You know, I'll say this, I'm
3 nervous about everything, but we are getting a little
4 bit lower numbers than what I was hoping to have for
5 you here on Monday morning, Tuesday, Wednesday.
6 We're going to stagger it a little this time. I was
7 hoping to have 200 here, 210, something like that.
8 And we're down to -- I think yesterday Ms. Wild told
9 me 182, I think. It doesn't do any good to worry
10 about everything. It doesn't do any good to have 60
11 here at the beginning, and it's always Juror No. 59
12 back there that is yapping, trying to get out. And
13 he or she is trying to get out for hardship, but
14 she's fouling up all our answers, and we're not
15 getting a good voir dire. So that's the reason I'm
16 kind of going along with y'all. But I'm still
17 getting a little nervous about the numbers. But the
18 numbers are arbitrary. I guess I still think we'll
19 get the jury picked. I'm optimistic we'll get them
20 picked in the first batch. And even if we don't get
21 them in the first batch, I think the first 120 or so
22 we'll still get the jury picked. So I'm not
23 panicking yet. That's a long way of saying that I
24 think if y'all are submitting names, you can assume
25 they're out.

1 MS. HARBOUR-VALDEZ: Okay, your Honor. And
2 then will Ms. Wild or Ms. Bevel send us the
3 numbering?

4 THE COURT: Do what?

5 MS. HARBOUR-VALDEZ: The numbering of how
6 they'll be seated. I know the Government probably
7 has it from Trial 1, but we weren't privy to that
8 correspondence.

9 MS. ARMIJO: We had it that morning.

10 MS. HARBOUR-VALDEZ: For us to say it's
11 one, two, three, four -- I don't know how they are
12 going to be -- seating chart. Thank you.

13 THE COURT: Let me see if I can check at
14 some point, because I've got the same concern,
15 because I'm probably going to -- for those of you who
16 have picked juries with me, you know how I do it and
17 I'm probably going to -- at some point here I'm going
18 to need to focus on that first group of 70.
19 Actually, it's going to be about a group of 85. I
20 talked to Ms. Wild about this yesterday. And we will
21 have 60 people in the courtroom.

22 So let's say, for example, out of our first
23 85, six don't show up for some reason. We're not
24 going to start with 54. You'll get a seating chart
25 of the first people. They will go ahead -- there is

1 no reason to wait till Monday to randomly select. I
2 don't think that does me good or you good or anybody
3 else. So we'll go ahead and randomly do the computer
4 generated random list. You'll get it. But remember
5 what you're getting. If those people don't show up,
6 I'm going to have them skip the seats so it doesn't
7 mess our seating charts up.

8 MS. ARMIJO: Did you say we're going to get
9 the random list before Monday morning?

10 THE COURT: Yes. Don't you think you want
11 it?

12 MS. ARMIJO: I do, absolutely. Very nice.
13 We've never had that before.

14 THE COURT: It just seems that it makes
15 sense. I mean, because of the way, the unique way we
16 have gone about this, it seems to me it makes sense
17 to go ahead and give it to everybody and me. And I
18 probably am going to review the first 85, if you want
19 to know what I'm doing. And that way, if six don't
20 show up, you know, we'll have -- it will look like we
21 have 66 in here, because they'll be at the back,
22 because we're going to skip those seats. But it will
23 allow y'all to start focusing on the first bunch
24 right off the bat.

25 MS. ARMIJO: All right. I just assumed

1 that they came up with those in the morning, but if
2 they could do --

3 THE COURT: Well, they do normally on our
4 normal trials, but there we've got one wave coming
5 in.

6 MS. ARMIJO: So we know.

7 THE COURT: We know.

8 MS. ARMIJO: That's great, okay.

9 THE COURT: Here, we're going to have one
10 wave coming in on Monday, one wave coming in on
11 Tuesday, and then another wave coming on Wednesday.
12 And if we get done, we'll call those people and tell
13 those people they don't have to come.

14 MS. ARMIJO: Okay.

15 THE COURT: I will double-check. But I
16 think when I left Albuquerque that was what we were
17 going to do. It makes sense to me.

18 MS. HARBOUR-VALDEZ: It makes great sense.
19 I just want to make sure we're going to get them in
20 the actual order they're going to be entering this
21 courtroom.

22 THE COURT: I will double-check. But
23 that's what I think I'm getting, and that's what I
24 think you're getting.

25 MS. HARBOUR-VALDEZ: That's very helpful.

1 Thank you, Your Honor.

2 MR. COOPER: And, Judge, that may be as
3 early as perhaps tomorrow?

4 THE COURT: Let me check. Let me ask
5 this -- y'all may know this better than me -- do you
6 think this is about it as far as the number of people
7 y'all may be in agreement to? I'm not trying to
8 pressure y'all, but I think it may be contingent on
9 giving y'all enough time. And then --

10 MS. ARMIJO: I think we had more that we
11 wanted to excuse, and the defense wasn't agreeing to.
12 So I think it's the defense.

13 THE COURT: All right. And, again, if
14 there is people that I overrule the Government's
15 challenge, but you still want to come back and say,
16 okay for cause, we agree with the Government. I know
17 it got rushed there because we had to meet demands of
18 Jury Services; you know, don't feel like you have to
19 protect the judge on this. I was sort of protecting
20 y'all in the sense that I took a hard line on
21 hardship. Because I didn't know if the defendants
22 were not agreeing to those because they may have fit
23 some profile or something.

24 So if you decide, well, even though the
25 Court overruled the Government's objection, if you

1 still want to come back and say, Fine, let them go.

2 MS. HARBOUR-VALDEZ: Why don't I do this,
3 Your Honor: If the Government will get back to me on
4 the four that were just sent, we'll file that one, so
5 that they can get those four excused. Those are the
6 ones we received this morning. We'll take a look at
7 the ones that you denied for the Government at lunch,
8 and see if there are any that we can agree to, and
9 I'll --

10 THE COURT: And I'm not tipping my hand one
11 way or another. I'm just telling you that I'm
12 leaving them in the pool for right now. That's fine.
13 There were a couple of them that I thought the
14 Government made some compelling cases. But I hated
15 to kick them out without giving you a chance to talk
16 to them, rehabilitate them, or whatever.

17 MS. ARMIJO: Your Honor, may I just ask one
18 more question, since we're getting a list ahead of
19 time. Let's say we have 18 here, and four don't show
20 up, so then, does that mean we're going to have four
21 empty seats, or are you going to take Juror No.
22 Number 61 and 62, and move them there.

23 THE COURT: I wasn't planning on it. I was
24 planning on just keeping empty seats. I'm hoping
25 there is not going to be four in the box. That would

1 be bad. But I still think it would be better than us
2 trying to redo our seats.

3 MS. ARMIJO: Correct.

4 THE COURT: And I think it would be better
5 just to list them at the back. They're not going to
6 know. We just leave them empty, and you know,
7 they've never been through a voir dire. So I'm
8 inclined that way we all are seated -- we walk in and
9 we kind of know where everybody is. And if we lose
10 people, there will just be empty seats there. I just
11 draw an X through those. And it helps me visually.

12 MS. ARMIJO: While we're talking on the
13 jurors -- because I don't know if we're going to pick
14 up the pretrial conference or not -- but I suggested
15 this to defense counsel, based upon our conversation
16 with the last jury, they had those really small
17 notebooks, pads of paper. And they indicated that
18 one of the problems was trying to go back with the
19 small ones. And they actually made a suggestion,
20 that they have bigger notebooks.

21 THE COURT: Okay.

22 MS. ARMIJO: You know? And I mean, I was
23 thinking like the notebooks at school that I get for
24 my kids.

25 THE COURT: The spiral notebooks.

1 MS. ARMIJO: The spirals with the cover so
2 that notes are covered. And they can write their
3 name on top.

4 THE COURT: Well, let me see if Ms. Bevel
5 during the lunch hour can see what we have, and
6 she'll show them to you. And if y'all agree, we'll
7 try to get them ordered, if we don't have them.

8 MS. ARMIJO: Okay. Thank you.

9 MS. HARBOUR-VALDEZ: Great, thank you.

10 THE COURT: Let's see, we're going to you,
11 Mr. Castle, Mr. Cooper, are we about to take up your
12 motion to dismiss?

13 MR. CASTLE: Yes, Your Honor. We have a
14 bit of an issue that we need the Court to resolve.
15 When we were last here on the motion to dismiss -- I
16 think it was March 16 -- Agent Acee was testifying,
17 and Mr. Beck was questioning him. And the Court
18 indicated that it needed to do some CJA business with
19 defense counsel.

20 THE COURT: Right, at 5:10 that day.

21 MR. CASTLE: Yeah. And so it stopped at
22 that point. Mr. Beck had indicated he might have
23 some more questions, wanted to finish a couple of
24 questions to finish an issue which was -- I can't
25 remember what that issue was. But the defense

1 obviously hadn't redirected him at all. And there
2 were a number of things that we needed to redirect
3 him on. In anticipation of that, we made some
4 inquiries with the Government. And I don't know
5 whether it was a misunderstanding or mistake, but
6 they told Agent Acee he didn't have to be here. And
7 they communicated with the supervising FBI agent who
8 deals with Touhy letters and subpoenas that the
9 defense had said that Agent Acee didn't need to be
10 present anymore. And I was the one who did the Touhy
11 letter and the subpoena. And obviously, I didn't let
12 him go.

13 So we can't present him at this time. I
14 would ask that he be -- come back tomorrow so we
15 could finish up with that. The Government has not
16 assured me yet, at this point in time, that they'll
17 make him available. But I don't think that the
18 Government has the authority to finish -- you know,
19 end a witness' attendance and testimony. Your Honor
20 does. And so we want him back and I want to get that
21 done. I know that Mr. Beck was aware we were going
22 to raise this today, and I think he's going to
23 address that issue.

24 THE COURT: All right. Mr. Beck.

25 MR. BECK: Yeah, Your Honor, Special Agent

1 Acee was done. His subpoena was for that week. He
2 answered all the questions in the Touhy letter. I
3 think my questions were wide, and went to Ms. Armijo
4 and whether he heard anything about a tactical
5 advantage. So we don't think he's under subpoena.
6 We don't think he can testify to anything else under
7 Touhy. So I guess, to the extent the Court is going
8 to entertain bringing Special Agent Acee back today
9 or tomorrow, I would ask what questions there are for
10 redirect that are included in Touhy, or within the
11 scope of my cross-examination.

12 THE COURT: Do you have redirect that you
13 want to ask, Mr. Castle?

14 MR. CASTLE: Yes, Your Honor.

15 THE COURT: And it relates to your motion
16 to dismiss rather than something else the Government
17 was questioning him about?

18 MR. CASTLE: Yes.

19 THE COURT: And does it fall within the
20 scope of Mr. Beck's cross-examination?

21 MR. CASTLE: Yes, Your Honor. And if the
22 Court recalls, when Agent Acee was on the stand, he
23 all of a sudden was revealing the identities of
24 informants that had never been disclosed previously.
25 So he said that was his disclosure, the best of his

1 ability. And Your Honor, I think, had made some
2 comments about whether that would resolve some of the
3 various claims that we made on our motion to dismiss.

4 And since that time, we've been able to go
5 back and look at what Agent Acee said. And we need
6 to clarify, because I think some of the informants
7 that he said that he had the identities of were not
8 actually the people he said they were. And we want
9 to question him about that so that the record is
10 clear, and the Court can rule on the motion to
11 dismiss properly.

12 THE COURT: So what I recall him saying is
13 that he had been sitting over here at this table
14 during the hearings that we were having, when we had
15 the defendants scattered across the room, and while
16 he was going -- he was going back to the old
17 documents. And he thought because of the internal
18 way they were written that he could identify who they
19 were.

20 MR. CASTLE: Right. When Corrections
21 couldn't, he thought that maybe he could. And I know
22 he was trying to go through it quickly in the two
23 days while he was in court. But the problem is it
24 may leave a false impression.

25 THE COURT: That there is no problem.

1 MR. CASTLE: Yeah, that that witness
2 exists, and here he is, and so there is no issue that
3 you've lost a witness.

4 THE COURT: Any other areas that you intend
5 to cover on redirect with Mr. Acee?

6 MR. CASTLE: If I could have just a second.

7 THE COURT: You may. While you're doing
8 that, how much of a problem is it going to be for him
9 to be here tomorrow or later today, Mr. Beck?

10 MR. BECK: He can't be here today.
11 Tomorrow, I mean, is -- ASAC, the supervisor of his
12 FBI he works closely with is being sworn in as US
13 Marshal.

14 THE COURT: Yeah, that's at 1:00.

15 MR. BECK: Right. So I think he was really
16 intending to be there, and would like to be there.
17 And that's why the United States worked hard with
18 other counsel who had subpoenaed Special Agent Acee
19 to be here this week.

20 THE COURT: Let me ask this: Would he be
21 able to come down here, be here at 8:30 in the
22 morning, put him on and get back up there?

23 MR. BECK: I can ask Special Agent Acee if
24 that's a possibility. He's not in cellphone range or
25 contact now.

1 THE COURT: Because if we can get him out
2 of here by 10:00, he should be able to roll in the
3 courthouse. Is it at 1:00; that was my memory?

4 MR. BECK: It's at 1:00. I think maybe a
5 little bit before 10:00. He would probably have to
6 be out of here to make it by 1:00.

7 THE COURT: How long do you think it would
8 last?

9 MR. CASTLE: I think it's going to be 15,
10 20 minutes, Your Honor. I don't know what their
11 recross might be, but --

12 THE COURT: Is anybody else going to have
13 anything more? Mr. Burke?

14 MR. BURKE: Ten minutes, max.

15 THE COURT: Ten minutes. Okay. So maybe
16 we could get him out about 9:00, 9:15, depending if
17 you're going to have anything more?

18 MR. BECK: Your Honor, I think previously
19 we've done a couple of witnesses telephonically.
20 That may be an option for Special Agent Acee, either
21 this afternoon or tomorrow morning.

22 THE COURT: Could you finish him up by
23 phone?

24 MR. CASTLE: I do need to show him some
25 documents, but my guess is that -- well, can I talk

1 to the Government about what documents he needs to
2 have available.

3 THE COURT: Okay. Could you do it by
4 phone, Mr. Burke?

5 MR. BURKE: Yes, Your Honor.

6 THE COURT: Well --

7 MR. BECK: I think that would work out. I
8 think we would have less opposition.

9 THE COURT: If they could give you the
10 documents, you can get them to him.

11 MR. BECK: Sure.

12 THE COURT: All right. So then with the
13 motion to dismiss, we need to wait on it until after
14 the testimony, Mr. Castle?

15 MR. CASTLE: Well, we do have some other
16 witnesses, but if we could do them after the lunch
17 hour. I didn't know that some of the other bad acts
18 motions would be resolved.

19 THE COURT: All right. So we'll pick up
20 your witnesses after lunch?

21 MR. CASTLE: Sure.

22 THE COURT: So I need to find out during
23 the lunch hour about the seating chart, and also make
24 sure that I'm answering accurately what we're doing
25 with y'all's agreed challenges. Is there anything

1 else I need to do during the lunch hour?

2 Ms. Torraco?

3 MS. TORRACO: Your Honor, would you
4 consider the notion that we be able to bring our own
5 chairs? I'm really having a hard time.

6 THE COURT: Let me talk to Ms. Wild about
7 that. That's something I'm having to coordinate with
8 the Marshal Service, so let me do that. Mr. Shattuck
9 has got a request in. You're certainly welcome to
10 bring in cushions or I think there was some idea that
11 we might be supplying cushions. Let me find that
12 out. I don't know where Ms. Wild is during the lunch
13 hour. But if I can resolve those, I will. If not,
14 we'll waive to wait till a little bit later.

15 All right. See y'all in an hour.

16 (The lunch recess was held.)

17 THE COURT: All right. Let's go on the
18 record. I think each defendant has an attorney or
19 more. Everybody is back in. Let me go over a few
20 things that I learned over the lunch hour. And I
21 hope I am not making a bigger mess of this than I was
22 making before the lunch hour. What you will receive
23 this afternoon, or in the morning -- we'll try to do
24 it this afternoon, but maybe in the morning -- is you
25 will receive a sequenced list of the way the jurors

1 will come into the courtroom. I've been informed
2 that it was already randomized long ago. And I think
3 everybody agrees with this, because the numbers that
4 we're using at the top, that's the numbers that I
5 guess they've gotten. So it's already randomized.
6 So we don't have to throw them into the computer.

7 What you have to get now is you have to get
8 what will be the first batch. That is what hasn't
9 been produced yet. So that first group that is going
10 to come into the courtroom, you will get a list of it
11 and it will be sequenced.

12 So, for example, I don't know who the first
13 85 are going to be. And the reason I use 85, is
14 that's what Ms. Wild tells me I better look at that
15 many resumes or questionnaires this weekend. And
16 you'll get that sequence. But we will wait till
17 Monday to prepare the seating chart because we don't
18 know who is going to be here. And so that way it
19 doesn't have the holes.

20 Now, she and I are going to have to both
21 check this out because we had holes in it for the
22 trial. And so I don't know if for some reason we did
23 it different, or we're doing it different this time,
24 we did it different last time or whatever. But
25 anyway, you will be able to create your own seating

1 chart. And then, if you want to revise it on Monday
2 morning, you'll get it.

3 So that's different than what I was telling
4 you in advance. But she also said that, you know,
5 probably if you wanted to get the seating chart
6 today, you could, and then it would have gaps. So
7 she's going to check on that. But at the present
8 time she's telling me that the seating chart wouldn't
9 be generated until Monday morning to avoid the gaps.
10 But you would have the sequence today or tomorrow.

11 On chairs, Ms. Wild is currently in control
12 of chairs. Chairs may be moved to Carol, Ms. Bevel.
13 So we'll see. But right now, if you have a concern
14 about chairs, deal with Ms. Wild, although it may be
15 moving to Ms. Bevel. We'll let you know.

16 On notepads, it's Ms. Bevel. So she's
17 working with Lorenzo in the office, and she'll be
18 showing you different notepads and we see if we can
19 agree on them.

20 I think that's all I was supposed to
21 report.

22 MS. HARBOUR-VALDEZ: Your Honor, will we
23 get a similar list for the group that's coming on
24 Tuesday and possibly Wednesday?

25 THE COURT: I would assume so. I haven't

1 thought about that far ahead, so we'll probably have
2 to ask that question. But I didn't ask that question
3 because I was focused on this first group. But I'll
4 try to find that out.

5 What I have done is -- now, going back to
6 Mr. Blackburn's issue -- I've told Ms. Bevel to start
7 moving Mr. James Garcia this way. And I've also told
8 her to get in touch with Jed Glazener, who I think is
9 his attorney from Albuquerque, to move him this way
10 this afternoon or tomorrow.

11 It seems to me that Mr. Blackburn or the
12 Government, somebody ought to talk to Mr. Glazener.
13 Is he going to waive this conflict? It would seem to
14 me -- now, I don't know a great deal about this, but
15 it would seem to me that if you represented him in
16 what everybody is telling me is an SNM -- people
17 think is an SNM murder or hit, we have two options.
18 One is I declare it substantially related, which then
19 is going to kick in the disqualification rules, and
20 then require a waiver from Mr. Garcia, your current
21 client, and from Mr. Garcia, your former client. And
22 I would need to get written waivers and oral waivers,
23 and see if everybody will waive any sort of conflict
24 of a substantial relationship.

25 Or -- and again, I'm not quite as versed in

1 this conflict as, you know, I'd like to be, but if
2 everyone were agreeable to not cross-examining him or
3 direct examining him about that prior murder, then it
4 wouldn't seem to me that it would be a substantially
5 related -- it's just another murder that he did and
6 it's not related.

7 But assuming that we don't have that sort
8 of agreement, that it would seem to me we're going to
9 kick in to the disqualification rules, and it's going
10 to require a knowing and voluntary waiver, it would
11 seem that if we cannot secure either an agreement
12 that nobody is going to go into the prior murder, or
13 we can't get an agreement that it's waived, it would
14 seem to me that I'm going to have to be in a position
15 to have to disqualify you. And if I disqualify you,
16 I don't think I can say that you're prepared to go to
17 trial. And so I will have to probably sever you out
18 and try you at some other point.

19 So think about that. But I'm not seeing
20 much other options than what I've laid out. There
21 may be things I don't know. But, Mr. Beck?

22 MR. BECK: Yesterday my conversation with
23 Mr. Garcia and Mr. Glazener was brief, because of the
24 time pressures that we were on. While I was there --
25 or I think maybe the night before, I was provided the

1 pleadings for Mr. Blackburn. So I raised the issue
2 with Mr. Garcia and Mr. Glazener. I told them that
3 they needed to talk about it.

4 THE COURT: When you said "they," you meant
5 Mr. Blackburn and --

6 MR. BECK: Mr. Glazener and Mr. James
7 Garcia. I told them that they needed to talk about
8 that issue. My initial impression was that Mr. James
9 Garcia was not inclined to waive the conflict.

10 But seeing this issue come up, as soon as
11 we got done yesterday afternoon, I contacted the U.S.
12 Marshals, and we filed a writ to get Mr. James Garcia
13 down this way, because I had a sense that the Court
14 would want to proceed that way. And so it's my
15 understanding they are going to have him here
16 tomorrow afternoon. I spoke to Mr. Glazener and told
17 him the same; that he should plan to be here tomorrow
18 afternoon with his client. So I think we are getting
19 that.

20 THE COURT: Well, if he's not going to
21 consent, is it a futile gesture bringing him?

22 MR. BECK: It very well may be. As I said,
23 I wasn't sure. So out of an abundance of caution, I
24 just wanted that to be an option.

25 THE COURT: Well, what about the first

1 option that it's off the table; everybody going into
2 the prior murder as SNM-related. I would think that,
3 A, I think Ms. Armijo mentioned this as a
4 possibility; I guess from the Government's
5 standpoint, are y'all willing not to go into it as a
6 prior murder?

7 MR. BECK: Yes. And I think there is a
8 misunderstanding there. I don't think it is an
9 SNM-related murder, in the sense that it was called
10 by or participated in by or it was an SNM-on-SNM hit,
11 anything like that. It was a street gang murder. He
12 was, I believe East Side San Jose, and it was a
13 Martineztown gang member. So it was out on the
14 streets.

15 And I think that is an option. I mean, I
16 think that it would be substantially related to the
17 extent that the defendants would want to go into it
18 as impeachment evidence. Then it would become
19 substantially related, if there is an agreement to
20 keep out the murder conviction because it is remote
21 in time, or for whatever reason. I agree with the
22 Court, that I think we can just do the Chinese wall,
23 and perhaps Mr. Davidson, or if Mr. Arturo Garcia is
24 appointed another attorney, that attorney
25 cross-examine Mr. James Garcia. Then I think we may

1 be able to work with it that way.

2 I think that under the rules, what I've
3 looked at -- again, it's not in front of me, I'm just
4 going to have memory and a little bit of looking into
5 this issue -- I believe that Mr. James Garcia was
6 released from prison on that murder in 2009. So his
7 release date is still within, I think, the last 10
8 years for that murder.

9 THE COURT: Well, I guess there wouldn't be
10 any problem with the defendants impeaching him with
11 the murder to show that he is less credible than
12 other witnesses, without us -- and then having an
13 agreement that we won't get into the details of the
14 murder. So at least the impeachment side would still
15 be available to either the Government or the
16 defendant, Mr. Garcia.

17 MR. BECK: I haven't looked closely enough
18 at it. I don't know if that's -- I don't know if
19 that's true.

20 I think there is still the concern that,
21 even if it is just the fact of the impeachment, I
22 think Mr. Blackburn's previous representation, the
23 duty to former clients, would still implicate a
24 direct conflict of interest, as opposed to a possible
25 conflict of interest, even if it's just for

1 impeachment. I think the rules are strong enough to
2 come into play with that.

3 THE COURT: What you're saying is Mr.
4 Blackburn couldn't agree with the other defendants
5 not to go into the --

6 MR. BECK: I think the agreement would have
7 to be that it's just -- it's not -- you just don't go
8 into it at all; you don't bring up the murder. It's
9 just off the table for Mr. Blackburn.

10 THE COURT: I guess another thing that I
11 should have mentioned as I was laying out the steps,
12 is the Government not calling Mr. Garcia. Is that an
13 option, rather than granting a continuance and
14 severing Mr. Arturo Garcia from the trial?

15 MR. BECK: That is an option. But the
16 United States intends to call James Garcia.

17 THE COURT: And so you would prefer that a
18 Court sever him and we have a separate trial in which
19 you call James Garcia, rather than not calling a
20 mistrial?

21 MR. BECK: Yes.

22 THE COURT: Okay. How are the
23 defendants -- I just haven't thought this through, so
24 I may be proposing something or throwing something
25 out that's just not doable. But do y'all need to --

1 I guess I tend to disagree with Mr. Beck that you
2 couldn't still impeach him with the conviction. But
3 does anybody need to get in -- I tend to agree, if
4 this is what Mr. Beck was saying, that I've still got
5 to deal with Mr. Blackburn's conflict issue. But at
6 least if everybody was agreeing we're not going to
7 get into the -- to what kind of murder it was, that
8 it was SNM-related, if that's not of anybody's
9 interests here, it would seem to me that it does
10 color the substantially related.

11 Did you have something you wanted to say,
12 Mr. Blackburn, or do you still want me to poll your
13 co-defendants here?

14 MR. BLACKBURN: No.

15 THE COURT: Anybody have any thoughts on
16 that? I mean, does anybody need to go further than
17 impeaching him with the conviction? Do you need to
18 go further, Mr. Benjamin?

19 MR. BENJAMIN: I guess I'm not prepared to
20 say that I'm not. Does that make sense, Your Honor?

21 THE COURT: Yeah. Well, here's the thing,
22 I think you're allowed to impeach him, and I think
23 you probably -- with the conviction -- and he was
24 convicted? Mr. Blackburn, there is a conviction
25 there?

1 MR. BLACKBURN: Oh, yes. Yes.

2 THE COURT: I didn't mean to rub it in. We
3 were talking in the vestibule, because it was just an
4 allegation of a murder, like the Ortega one, or
5 something like that, then I'm not sure you would be
6 able to get it in; it would be more of a 404(b), if
7 there is a conviction. But I guess I'm not sure why
8 the defendants would want to have the jury know that
9 another murder was racketeering activity.

10 I guess -- then I began to ask what's the
11 purpose? If the purpose is strategic to try to get
12 Mr. Blackburn out or sever or something like that,
13 then I guess I need to probe you a little more. But
14 if there is some legitimate reason, and it's
15 admissible, then I'd certainly entertain it. I don't
16 want to mess people's strategy up.

17 MR. BLACKBURN: The only thing I was going
18 to say, Your Honor, is I did represent him in 1996.
19 And it wasn't an SNM murder. It was a local street
20 murder there in Albuquerque. And as a result, then,
21 he went to prison, and then became --

22 THE COURT: Then allegedly became a gang
23 member?

24 MR. BLACKBURN: Then allegedly became an
25 SNM member.

1 When we were here two weeks ago, or
2 whenever it was, three weeks ago, during Mr. Beck's
3 cross-examination of Mr. Garcia, he asked him about
4 his memory. And eventually it came out that -- Mr.
5 Beck said, Well, if you heard the recordings, would
6 you take a different posture, I guess, is what,
7 basically, he was talking about. We indicated that
8 we had never heard any of the recordings; that there
9 wasn't -- I think Mr. Beck said, Well, I just called
10 Agent Roundy last night and found out that there was
11 these tapes. And the Government provided those
12 tapes. And the tapes were based upon a 2013 arrest
13 as to when he was arrested on a case that then he
14 pleads guilty to and goes to federal prison on. It's
15 about eight hours. And it starts in Albuquerque when
16 they arrest him. And they sort of debrief him, and
17 then they take him to his wife's house. And then
18 they drive him all the way down to here. It's about
19 eight hours' worth of conversations anyway.

20 So I don't think that he's going to waive
21 the conflict, because there is a discussion about my
22 representation of him in 1996, because they're asking
23 him why he was in custody and stuff. And he tells
24 them, and he goes through some things as to why he --
25 the issue was that he got convicted of second degree

1 murder, which was nine years. But he had two prior
2 convictions, so he got two habituels, so he got 24
3 years. So he was trying to explain to the agent as
4 to why he got 24 years, even though he should have
5 gotten nine. The colloquy wasn't very pleasant
6 listening to him talking to the agent about my
7 representation. So it's hard for me to imagine --

8 THE COURT: That he would waive it?

9 MR. BLACKBURN: -- that he would waive. So
10 I just can't imagine that that's going to happen.

11 THE COURT: Well --

12 MR. BLACKBURN: But at the same time, I
13 don't know -- I think we're getting the notes this
14 afternoon as to basically --

15 THE COURT: So you're saying --

16 MR. BLACKBURN: -- what he said.

17 THE COURT: You're saying it's not --
18 you're saying that you're not sure that this is
19 substantially related because you don't have any
20 reason to think it's an SNM gang hit, or --

21 MR. BLACKBURN: No. There is nothing that
22 was SNM about it.

23 THE COURT: Is that your position as well,
24 Mr. Beck?

25 MR. BLACKBURN: It's a street gang that

1 feeds into SNM, supposedly.

2 MR. BECK: Yes, it was a street gang, and
3 he was not SNM. It is a street gang that feeds into
4 the SNM. But we don't take the position that this
5 was an SNM-related murder.

6 THE COURT: Okay. And have you had a
7 chance to talk to Mr. Glazener?

8 MR. BLACKBURN: No, Your Honor. I know the
9 Court was looking for attorneys to represent him.
10 And I did not realize -- I know that some of the
11 individuals that your staff was thinking about were
12 not the individuals that showed up to represent him
13 yesterday. So I did not know who he was until Ms.
14 Salazar or somebody told me who he was.

15 But I don't know, there may be other issues
16 concerning his cooperation and what he's going to say
17 about all of us sitting in the courtroom.

18 THE COURT: Okay.

19 MR. BLACKBURN: And that's an issue that I
20 don't think that we know about at this point in time,
21 until we see some of the -- until we see the
22 documentation as to what's going to happen on that.

23 At the same time, the issue -- I think it's
24 important to say this -- the same time the issue of
25 the walled off attorney, we're going to have to get

1 another walled off attorney, because Mr. Davidson and
2 I --

3 THE COURT: I think I understand that.

4 MR. BLACKBURN: So it would have to be
5 completely different. Okay?

6 THE COURT: All right. We'll think about
7 whether you want to take me up on my offer of
8 starting to try to find you somebody else, and
9 certainly I'll take your input on it. And, you know,
10 I'm not restricting any ideas --

11 MR. BLACKBURN: I understand.

12 THE COURT: -- from anywhere. So I'd have
13 to go to Ms. Waters and talk about it. But --

14 MR. BLACKBURN: No, I understand. And we
15 were talking about that. Again, the unfortunate
16 issues that happen is that Mr. Davidson needed to go
17 back this afternoon. So that becomes an issue, so I
18 don't know how to handle that.

19 THE COURT: I understand. Well, it sounds
20 like -- and this is probably what you're going to
21 tell me, Mr. Castle, but I'm not trying to cut you
22 off. You can't say yet until you get this
23 information from the Government, and see what he's
24 going to say. Because that's what Mr. Benjamin is
25 saying. It may be that if nobody takes the

1 position -- and I feel like I can honestly write it
2 down as well, that the murder is not substantially
3 related, then it may be that I don't have to
4 disqualify Mr. Blackburn. But then, if somebody
5 looks at this material the Government is about to
6 give you, and somebody says they don't think I can
7 take that position, or the defendants, for whatever
8 reason, don't want him to take that position, I may
9 then have to look at it and make an independent
10 determination. And then I think that's sketched out
11 what the consequences are.

12 Mr. Castle.

13 MR. CASTLE: I was just going to add
14 something else.

15 I haven't fully looked at what Mr. Garcia's
16 prior conviction was all about, the facts -- the
17 underlying facts of it, but I could easily imagine
18 that those underlying facts could rise to the level
19 that we will be arguing or raising factual
20 circumstances in that case as a pertinent character
21 trait of Mr. Garcia.

22 I've noticed that a lot of the people that
23 the Government are calling have prior convictions
24 which involve them lying to the police in order to
25 try to get out of trouble. And obviously, that would

1 be a pertinent character trait in cross-examination
2 of the witness, because that's what we're alleging as
3 happening here, and it would be central to our
4 defense. So even if we look at these notes, I doubt
5 these notes will have that kind of information in
6 them. So I don't think we're going to get an answer.

7 And we can try to put our nose to the
8 grindstone and look into all the facts and priors.
9 But just letting the Court know that.

10 THE COURT: I guess I'm just thinking out
11 loud, understanding you have to do that, and I don't
12 think I'm saying anything that would preclude you
13 from doing that. But I'm also not -- it seems to me
14 that anytime you have a prior conviction, that raises
15 those questions and defense lawyers may want to go
16 into it. But it still may not cause Mr. Blackburn's
17 prior representation to kick into being substantially
18 related to the crimes that are alleged here.

19 Do you see a flaw in that analysis?

20 MR. CASTLE: I don't, Your Honor. And I'm
21 not arguing the conflict motion, what is considered
22 substantially related, I think is different than what
23 is admissible. I think what's admissible under 401
24 is a lot lower standard than what would be
25 substantial under the conflict standard.

1 THE COURT: I tend to agree.

2 All right. Well, we'll leave that there.

3 We got it set in motion, so we'll go from there.

4 I see Mr. Sapien came in the back. Is he
5 related to one of the witnesses that y'all are
6 calling here on this motion to dismiss, Mr. Castle?

7 MR. CASTLE: No, he was relevant to our
8 motion, our targeted motion, concerning statements
9 that we had taken up last time. Mr. Sapien said he
10 wasn't available last motions hearing, so he's
11 available here today.

12 THE COURT: Okay.

13 MR. CASTLE: And Mr. Quintana, who is his
14 client, is in custody down -- somewhere in the
15 building.

16 THE COURT: And this relates to -- give me
17 the number it relates to.

18 MR. CASTLE: Docket No. 1909; paragraph 16
19 of Document 1909.

20 MR. BECK: And, Your Honor, if we're
21 thinking about getting back into these 104-type
22 hearings again this week, the United States filed a
23 response to a supplement, Billy Garcia's supplement
24 to that targeted response, last night, which is
25 Document 2051, and the United States would ask the

1 Court to look over that and give it a thought before
2 the Court decides to continue with these 104-type
3 hearings if the Court is inclined to do so today.

4 THE COURT: Well, I read your motion. And
5 I know you're frustrated with these, and it came out
6 in your motion that you're very frustrated with the
7 Court about it. But I think, if you think about it,
8 we have 104-type hearings all the time. For example,
9 we had them in the middle of the trial last time,
10 where we took evidence outside the jury. The James
11 hearing is kind of a big 104. You mentioned
12 exceptions, suppression hearings.

13 I'm sensitive to your criticism of the
14 Court for not allowing these things to become
15 discovery motions, but we do have a little group of
16 four to six statements -- and it seems to be
17 growing -- of statements that you're trying to get
18 in, and I'm trying to script out at trial. It seems
19 to me that -- I mean, I guess we can just start the
20 trial, and then break the trial to then have the
21 hearings, if I can't do the testimony in front of the
22 jury. But I guess I'm -- it seems to me that while
23 you keep using the word "unprecedented, no support,"
24 things like that, but they have them all the time.
25 So it's a timing issue. And it may be that we're

1 doing a lot of things to try to script out the trial.

2 MR. BECK: I think the distinction in this
3 case is that the 104-type hearing that we had in the
4 middle of the last trial was because we had the
5 contingent relevancy issue. And Mr. Archuleta's
6 testimony, to get the Court to that position of
7 whether it was admissible is inadmissible unless that
8 contingency is met. So that testimony from Mr.
9 Archuleta should have properly been excluded from the
10 jury.

11 The testimony that we've seen in these
12 104-type hearings is perfectly admissible in its own
13 right. The only question is whether that further
14 question: When the declarant told you this, did the
15 declarant tell you that X person ordered it, or X
16 person carried it out? That single question is all
17 that would be inadmissible or should be heard outside
18 of the jury. So that's why I'm saying it's
19 unprecedented that all the time, in trials and
20 hearings, whatever it may be, but in trials, when we
21 come to some hearsay exception or hearsay exclusion,
22 the United States lays the foundation, and then asks
23 the question. And if the foundation isn't properly
24 laid, it's inadmissible. If it is, it's admissible.
25 And so what we've seen in these hearings is an

1 exact -- it's the exact same thing that would come
2 out at trial, except maybe we start with the
3 question: Did your client implicate Billy Garcia, or
4 did you implicate -- did whoever told you this
5 implicate Billy Garcia?

6 And what the United States' position is is
7 that we have much better things to do with our time
8 than to spend our time finding out the answer to that
9 one question. And we could just ask the question and
10 they object, or we could just agree to approach
11 before we ask that one question during trial.

12 THE COURT: But then don't we have to take
13 a break in the trial to get that answer?

14 MR. BECK: Sure. But I mean, we did that.
15 And it takes one minute; five minutes at the most. I
16 mean, the problem here is that it's been complete
17 gamesmanship. And I am frustrated with what
18 happened, and for good reason.

19 I'm also frustrated, as I think Mr.
20 Quintana's lawyer was last week, that they have
21 deliberately attempted to get around the lawyers to
22 ask these questions. I think that's completely
23 improper.

24 THE COURT: I'm not tracking on that. What
25 are you saying?

1 MR. BECK: I'm saying two weeks ago, three
2 weeks ago, when Mr. Sapien came in here and tried to
3 quash the subpoena, he felt like he had been
4 deliberately avoided, instead of providing notice to
5 him that Mr. Quintana was coming. We heard the same
6 thing from Mr. Fallick for Mr. Lucero; we heard the
7 same thing from Mr. Hosford for Mr. Clark. They just
8 weren't provided notice that their clients were being
9 subpoenaed to come here and testify.

10 THE COURT: That's a separate issue that I
11 think Mr. Sapien can argue. But I guess if we're
12 trying to have a smooth trial and trying to help the
13 Court determine what evidence is coming in, rather
14 than waiting till somewhere in week three that we ask
15 the question, and then I have to make a fairly sudden
16 decision based upon which way that goes, it seems to
17 me that to smooth it out. It's a little bit like the
18 James hearing; it helps us to figure out whether this
19 evidence is coming in by asking them a question
20 outside the presence of the jury today, rather than
21 waiting till the middle of the trial.

22 MR. BECK: Well -- and I don't think we
23 have that problem. I mean, I think all the facts
24 will be laid out. They've already been laid out in
25 the motions, they're in the reports. They will be

1 laid out at trial. And it's just that one single
2 factor: Does the evidence come in or does it not?
3 And I think it would be more expedient for everyone
4 to do it at that point, compared to doing it now when
5 we have other motions that need to be argued.

6 THE COURT: But would you agree with me
7 it's going to require we excuse the jury, have a 104
8 hearing at that point, and then bring the jury back?

9 MR. BECK: I don't. I don't agree with
10 you. I disagree with you. I think what will happen,
11 for instance, if we take Mr. Garcia -- and I'm just
12 familiar with this -- but what would have been
13 Mr. Garcia's truthful testimony --

14 THE COURT: Well, it's so hard for us to
15 use, I think -- and I could be wrong on this -- but
16 it seems to me it's so hard to use Mr. Garcia as an
17 example of anything. But --

18 MR. BECK: I can use a different example.
19 His is fresh in my mind because since we indicted
20 him, that's all I've been working on the last two
21 weeks, instead of working on this trial.

22 But if we use Mr. Benjamin Clark as an
23 example, if Mr. Benjamin Clark is going to come in
24 here, and he's going to say: Somebody told me -- I
25 participated in a murder, and, you know, Anthony Baca

1 told me I had to do it, okay? Well, certainly that
2 declarant, a defendant in here, that's an admission
3 against interests. We can get into where he was
4 living; we can get into that he was an SNM member,
5 and who he was locked up with. All those things
6 could go in front of a jury. We can get out that the
7 defendant admitted to him his crime. The only thing
8 is that last question whether the Anthony Pup Baca
9 ordered him to do it. And we know that it happened,
10 that he did, because the United States has prepared
11 Mr. Clark for trial, because everyone has the 302
12 reports where he says, "Anthony Ray Baca ordered me
13 to do it." The only question then is whether that is
14 admissible as a statement against penal interests by
15 the declarant.

16 So we can ask the question: Who ordered
17 that? The defendant can object. We can approach the
18 bench. We can say it's a statement against penal
19 interests, here's the corroborating circumstances
20 that allow it to come into the trial here. So
21 everything else comes out. The only thing is just
22 for the Court to make a call up or down, whether it
23 comes in as a statement against penal interests.

24 And so I think the proper way -- and I
25 think what would be expedient for everyone is to

1 allow that to take place. I think we've already
2 briefed up the statements that everyone is concerned
3 about. So that issue is in front of the Court. The
4 defendants are alerted to it. The prosecution is
5 alerted to it. It's teed up, it's ready to go. We
6 can decide that at trial, because everything else is
7 admissible, except for perhaps that one other
8 implication from the statement.

9 And, again, we still have the motion to --
10 Billy Garcia, Edward Troup's motion to dismiss we
11 have to take evidence on in the next two days. We
12 have to argue those motions. I assume we're probably
13 going to argue James' motion targeted response to the
14 statements against penal interests.

15 There are a number of ways that we can
16 better use our time than just getting out the same
17 testimony we're going to get out in court.

18 THE COURT: All right. Thank you, Mr.
19 Beck. Do you have something you want to say on this,
20 Mr. Castle?

21 MR. CASTLE: Yes, Your Honor. There is a
22 lot more to it than that. And I think the Court had
23 the hearings in Trial 1 before the jury ever sat
24 down. It dealt with whether a particular statement
25 was truly against the inmate's interests. So there

1 is a lot more questions that go into that.

2 When we had those hearings the week of
3 March 12, and there were witnesses, such as Ben
4 Clark, who was very quick -- wasn't a discovery
5 hearing; it was a very quick hearing. And what we
6 were doing was exploring whether any statement that
7 other defendants made implicating Mr. Billy Garcia
8 was truly against interest. And what Mr. Clark told
9 us was none of them implicated Mr. Garcia. Questions
10 were terminated, it was done.

11 That statement won't come in is my guess
12 because the Government could not establish it. But
13 other witnesses might take more, it might take more
14 questions, such as: Tell me about this. Was the
15 person bragging? Was the person sitting there
16 telling war stories to try to gain, you know, some
17 higher standing in the community? Is this a person
18 that you know that was bragging about things that
19 they obviously didn't do? Things of that nature.
20 And we have to explore all of that in the context of
21 trial.

22 Now, I do take disagreement with the
23 Government saying we're playing a game. What
24 happened here was on March 7 -- the Government waited
25 until March 7 to tell us what statements they were

1 going to bring in against our clients. Two days
2 later, March 9, I filed a targeted motion, 1909. On
3 that day we subpoenaed these witnesses, and informed
4 their lawyers, including Mr. Sapien, who is here in
5 this courtroom. Mr. Cooper tried calling him that
6 very single day.

7 The newest motions -- we got discovery last
8 Friday talking about those statements. That same day
9 we made efforts to subpoena the witness, or writ
10 them. We contacted their lawyers, if they had them,
11 and spent the weekend trying to call them. And the
12 Government knows that because those lawyers called
13 them.

14 So the fact that we turned around within
15 two days and contacted lawyers and subpoenaed
16 witnesses so we could be prepared for a hearing that
17 we should have been given notice of long before,
18 yeah, there is games being played, but it's not on
19 the defense's part.

20 But with that aside, I think the Court
21 probably wants to deal with the substance of the
22 issue. And the substance is that, you know, we're
23 going to risk mistrials. If you do exactly what the
24 Government just suggested, and allow them to say,
25 Well, who -- you know, who told him that information?

1 Well, you know, it came from Billy Garcia.
2 And then on further questioning, it turned out it
3 really didn't come from Billy Garcia, it came from
4 somebody else, and somebody else may have said that
5 they thought that Billy Garcia did it, and, you know,
6 several layers of hearsay, and they can't establish
7 personal knowledge, or all the other aspects that
8 we're going to have to look at in every layer of
9 hearsay. And I think that really is going to happen.

10 And I'll give the Court a really great
11 example of it. And I know the Court doesn't like
12 James Garcia as an example. But I'm going to take
13 the Government's version. The Government's version
14 is at a barbecue Mr. Troup said Billy Garcia ordered
15 the hit. But their other witness, Mr. Leonard Lujan,
16 says that he didn't tell Troup who ordered the hit.
17 So how would Troup know? So there is an issue as to
18 whether there is even personal knowledge.

19 I would note that the eight-hour interview
20 that we all had to listen to, Mr. Garcia was
21 questioned all about the barbecue; never mentioned
22 anything about Billy Garcia in the entire eight hours
23 that we had to listen to.

24 So going back to that, that's why we have
25 these hearings, so that we can establish that and

1 figure out whether it's admissible before we put
2 damaging evidence in front of jury. We're already
3 going to have a lot of jury instructions telling them
4 to disregard certain evidence against certain people.
5 But that's usually done before we hear the evidence,
6 not after we hear the evidence.

7 What the Government is inviting is: Let's
8 try -- you know, take the risk damage, then try to
9 fix the damage afterwards through a limiting
10 instruction. And that is just not going to work.

11 And like I say, I know the Court probably
12 saw it. I didn't ask a lot of questions. James
13 Garcia, I think I asked two pages. Other ones I
14 asked less. So I'd ask the Court to continue in that
15 process, so we don't have to take these breaks. And
16 just to note, to give an idea how long the break is,
17 this is how long we've been arguing this issue, we're
18 going to be having kind of lengthy arguments probably
19 with regards to those individual statements.

20 THE COURT: Well, I'm inclined to go ahead
21 and allow it. I think that there are some unique
22 aspects to the trial. And there is a handful of
23 these statements that I think need to be dealt with,
24 and the Court needs to have an opportunity to think
25 about them because they're fairly important

1 evidentiary issues.

2 So is your first witness Mr. Sapien's
3 client?

4 MR. CASTLE: It is, Your Honor.

5 THE COURT: And I believe, Ms. Bevel, I
6 think you may need to tell them that we're ready.

7 THE CLERK: Yes.

8 THE COURT: Mr. Sapien, do you want to come
9 up and sit next to your client up here?

10 MR. SAPIEN: Sure, Your Honor.

11 THE COURT: Good afternoon to you, Mr.
12 Sapien.

13 MR. SAPIEN: Good afternoon, Your Honor.

14 THE COURT: We're going to get Mr. Sapien
15 up here next to you, so he'll be next to you. Before
16 you're seated, if you'll raise your right hand, Ms.
17 Bevel will swear you in.

18 FRED QUINTANA,
19 after having been first duly sworn under oath,
20 was questioned and testified as follows:

21 DIRECT EXAMINATION

22 THE COURT: All right. Why don't you state
23 your name for the record.

24 THE WITNESS: Fred Quintana.

25 THE COURT: All right. Mr. Quintana. Mr.

1 Castle.

2 BY MR. CASTLE:

3 Q. Mr. Quintana, I'm just going to ask you a
4 few just preliminary questions. In 2001, were you
5 residing in the Southern New Mexico Correctional
6 Facility?

7 A. Yes.

8 Q. And did you become aware at some point in
9 time that two inmates had been murdered?

10 A. I was released at the time that happened.

11 Q. So you weren't present at the time that
12 happened?

13 A. No.

14 Q. Sometime after that event did you ever talk
15 to any of the defendants that are in this courtroom
16 about their involvement in those murders?

17 A. Yes.

18 Q. And who did you talk to?

19 A. To Edward Troup and Chris Chavez.

20 Q. Let's start with Mr. Troup. Where did that
21 happen?

22 A. On the streets.

23 Q. Of?

24 A. In Albuquerque, New Mexico.

25 Q. And do you recall generally when?

1 A. No. It was not too far back now from
2 before we got arrested on this case.

3 Q. Okay. And what were the circumstances of
4 you and he talking about this event?

5 A. I ran into him at a store.

6 Q. And was he just talking to you in a store
7 about a murder?

8 A. No. I ran into him, and there was a
9 discussion about his brother had gotten in trouble in
10 the federal prison, and he had asked me what the
11 situation was. And I said that he had got in a
12 switch with Mr. Candelaria's brother. And he stated
13 to me, "Well, I helped take out Fred Dawg, and I gave
14 squina with Pancho. So isn't that enough to get my
15 brother out of it?"

16 Q. So is that the whole of it; the beginning
17 and the end of that discussion?

18 A. Yes. I told him I would talk to Richie and
19 see what we could do.

20 Q. So he didn't implicate anybody else in that
21 murder?

22 A. No.

23 Q. Let's go to Christopher Chavez. What were
24 the circumstances behind that?

25 A. I ran into him and Willie Amador at a gas

1 station. I was putting gas in my motorcycle. And I
2 asked Willie: "What are you doing with Critter?"

3 And he stated, "He's down. I was with him
4 when he took care of that trip with Looney."

5 And I said, "Really?"

6 And Chris just said, "That's how I earned
7 my bones."

8 Q. Okay. I'm sorry, let me break that down a
9 little bit. So was it Willie that was talking to you
10 or Christopher Chavez?

11 A. Willie.

12 Q. Did Christopher Chavez say anything about
13 his involvement?

14 A. All he said is, "That's how I earned my
15 bones."

16 Q. So Willie told you exactly what? What did
17 Willie say to you? I'm sorry, some of the terms I
18 didn't understand.

19 A. Willie stated to me that he was hanging out
20 with him, because he down because he helped take out
21 Looney.

22 Q. So did Willie say anything about anybody
23 else other than Mr. Chavez being involved in that
24 murder?

25 A. No.

1 Q. And so was Mr. Amador kind of pumping up
2 Mr. Chavez; in other words, like saying, you know,
3 giving him credibility?

4 A. I guess you could say so, yes.

5 MR. CASTLE: I don't have any other
6 questions.

7 THE COURT: Thank you, Mr. Castle.

8 Mr. Burke.

9 EXAMINATION

10 BY MR. BURKE:

11 Q. Mr. Quintana, let me try to clarify. You
12 had one conversation with Edward Troup after you got
13 out of the Southern?

14 A. Yes.

15 Q. And what store were you in?

16 A. I don't recall.

17 Q. And what year was it?

18 A. It was 2015.

19 Q. 2015?

20 A. Or '14. He had just got out, finished
21 doing a parole violation.

22 Q. So I'm sorry that I have to pursue this a
23 little bit. You went back -- how long were you out
24 of prison?

25 A. I was out since 2008.

1 Q. From 2008, until whenever you went back in
2 on a parole violation?

3 A. No, I got picked up on this case in 2015.

4 Q. Okay. So was the conversation you had
5 before or after you got picked up on this case?

6 A. Before.

7 Q. Okay. And do you believe it was 2014 then?

8 A. I can't be exactly positive with the date.

9 Q. It could be 2010?

10 A. No.

11 Q. Or '11?

12 A. No.

13 Q. '12?

14 A. No.

15 Q. '13?

16 A. No.

17 Q. '14?

18 A. I cannot say. It was closer to the end of
19 '14. I know he had just got out on a parole
20 violation he had finished. I'm not exactly sure of
21 the date.

22 Q. And he had just gotten out on a parole
23 violation, or you had?

24 A. He had.

25 Q. He had. And you don't remember the store;

1 is that right?

2 A. No.

3 Q. And, once again, what did you say and what
4 did he say?

5 A. We were having a conversation. He asked me
6 how his brother had gotten into a switch in federal
7 prison. And I told him that he had called Richie's
8 brother a rat.

9 Q. I'm sorry, what did he say?

10 A. How his brother had gotten into a switch.

11 Q. What's a switch?

12 A. He had gotten into trouble.

13 Q. Okay. And then what was the next thing
14 that was said?

15 A. And I said that he had called Richie
16 Candelaria's brother a rat, so a hit was put on his
17 brother.

18 Q. A hit was put on his brother?

19 A. Yes, on Edward Troup's brother, in federal
20 prison.

21 Q. Okay. And then what was said?

22 A. He stated, "Well, I helped take out Fred
23 Dawg and I gave squina with Pancho. Isn't that
24 enough to give my brother squina?"

25 Q. I took out Fred Dawg, and what?

1 A. "I gave squina with Pancho. Isn't that
2 enough to help get my brother out of that switch?"

3 Q. What does that mean, "I gave squina to
4 Pancho"?

5 A. I helped out.

6 Q. And what was the next part?

7 A. "Isn't that enough to help my brother get
8 out of that switch," he said.

9 Q. And then what did you say to that?

10 A. I told him, "I'll talk to Richie and see
11 what we could do."

12 Q. And who was it you were going to talk to?

13 A. Richie Candelaria.

14 Q. And you were going to talk to Richie
15 Candelaria because you thought that you might be able
16 to get the hit that was on Edward's brother off of
17 him?

18 A. No. I was going to bring it up to him.
19 And I wasn't sure if they would or wouldn't. I would
20 just bring it up to him.

21 Q. And was the point of bringing it up to him
22 so that that hit on Edward's brother would come off?

23 A. That's --

24 Q. Or at least it would be discussed?

25 A. Yes.

1 Q. All right. So this conversation lasted, it
2 sounds like, going back and forth, two minutes?

3 A. Yes.

4 Q. And then you went your separate ways?

5 A. We just bull-crapped around, just joked
6 around a little bit. I can't recall everything. But
7 we just touched base because I've known him for a
8 long time.

9 Q. Yeah, before this time, when you were
10 talking to him, what was the last time before that
11 that you had seen Edward Troup?

12 A. In prison.

13 Q. And you left in 2001?

14 A. Yes.

15 Q. So the last time you would have seen him
16 was in sometime before 2001?

17 A. Yes.

18 Q. And then you saw him again in 2015, and you
19 started talking about this?

20 A. Yes.

21 MR. BURKE: All right. Thank you.

22 THE COURT: Thank you, Mr. Burke.

23 Any other defendant? Mr. Granberg?

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EXAMINATION

BY MR. GRANBERG:

Q. Mr. Quintana, when did this exchange with Willie Amador and Chris Chavez take place?

A. About -- I'm going to say maybe 2012. Somewhere around there. I'm not too sure.

Q. 2012?

A. Somewhere -- that was before Willie passed away, I know that.

Q. And so, from what I understand, you were pumping gas at a gas station?

A. Yes, I was putting gas in my motorcycle.

Q. And they also just happened to be at the gas station?

A. They were putting gas in a vehicle on 8th Street and Bridge, at the corner gas station.

Q. And they approached you or you approached them?

A. I seen Willie, and I was talking to him. At that time I seen Chris coming from the store.

Q. And were you high at the time?

A. No. I was on federal parole.

Q. What about, could you tell if Willie was high?

A. Probably.

1 Q. Probably. Could you tell that Chris Chavez
2 was high?

3 A. Yeah.

4 MR. GRANBERG: Okay. Pass the witness.

5 THE COURT: Thank you, Mr. Granberg.

6 Anyone else on the defense side?

7 All right. Mr. Beck, cross-examination of
8 Mr. Quintana?

9 CROSS-EXAMINATION

10 BY MR. BECK:

11 Q. Mr. Quintana, when you were at the Southern
12 New Mexico Correctional Facility, in 2001, was Billy
13 Garcia there with you?

14 A. No, he wasn't.

15 Q. Who was -- who was sort of highest ranking
16 member of the SNM down at Southern before that?

17 A. At the time that I got there, Lino Giron
18 had had the keys to the car.

19 Q. Having keys to the car, that means he's the
20 highest ranking member, right?

21 A. Yes.

22 Q. When Billy Garcia got down to Southern, is
23 he a higher ranking member than Lino Giron?

24 A. Yes, he is.

25 Q. And in your experience with the -- well,

1 when did you join the SNM?

2 A. In 1993.

3 Q. And in your experience in the SNM, what
4 happens when a high ranking member gets into a new
5 facility, what happens with the keys to that
6 facility?

7 A. He takes over the yard.

8 Q. I want to talk to you about Mr. Troup's
9 conversation with you in the grocery store. It
10 sounds to me like he told you he gave squina with
11 Fred Dawg and Pancho, I think you said?

12 A. Yes.

13 Q. What does give "squina" mean?

14 A. That he helped.

15 Q. What do you think he meant by he gave
16 squina? How do you think he helped?

17 A. He helped kill him.

18 Q. And have you heard from other SNM members
19 about the murder of Fred Dawg or Pancho?

20 A. Yes.

21 Q. And have you heard that Mr. Troup helped
22 kill Fred Dawg or Pancho?

23 A. Yes.

24 THE COURT: Hold on. Mr. Burke, did you
25 have anything?

1 MR. BURKE: Objection, hearsay, Your Honor.

2 THE COURT: Well, it's a 104. Let me see
3 what the evidence is. Overruled.

4 Q. I don't think I heard your answer. Have
5 you heard from other SNM members that Mr. Troup
6 helped kill Pancho and Fred Dawg?

7 A. Yes.

8 Q. Approximately how many other SNM members
9 have told you that?

10 A. Several. I've heard it from Wino, who was
11 directly involved in Fred Dawg's murder also.

12 Q. It sounds to me like you think that Mr.
13 Troup's motivation in telling you that at that time
14 was he thought you could help -- was it Richie
15 Candelaria get his brother off?

16 A. Yes, at that time, I was known to have the
17 keys in the federal penitentiary when I got released.

18 Q. If that information that Troup told you
19 wasn't true, and the information that you passed on
20 to Richie Candelaria wasn't true, what would happen?

21 A. I'd get killed myself.

22 Q. And would Mr. Troup also get in trouble?

23 A. Yes.

24 Q. Would it help get his brother off if it
25 wasn't true?

1 A. No.

2 Q. When you talked with -- well, let me ask
3 you this: Was Willie Amador an SNM member?

4 A. He was an associate.

5 Q. Was Christopher Chavez an SNM member?

6 A. Yes.

7 Q. Was Edward Troup an SNM member?

8 A. Yes.

9 Q. And you're an SNM member, right?

10 A. Yes.

11 Q. As SNM members, do you talk about SNM
12 crimes and SNM business together?

13 A. Yes.

14 Q. When Mr. Troup was telling you about the
15 murder of Fred Dawg and murder of Pancho, were there
16 others involved in this conversation with you two, or
17 was it just two you?

18 A. It was just us two.

19 Q. Just you as an SNM member and he as an SNM,
20 right?

21 A. Yes.

22 Q. And he knew or he expected that you were
23 going to pass this information on to another SNM
24 member?

25 A. Yes.

1 Q. How close were you to Mr. Troup?

2 A. I've known him from approximately since the
3 early '90s.

4 Q. Since the early '90s, you said?

5 A. Before I went to prison.

6 Q. Does Mr. Troup often talk a lot to other
7 SNM members?

8 A. Yes.

9 Q. I think you said -- I think when Mr.
10 Granberg was asking you questions about Mr. Chavez,
11 you said you thought he was high?

12 A. Yes.

13 Q. Was Mr. Chavez high a lot?

14 A. Yes.

15 Q. And have you gotten high before?

16 A. Yes, I have.

17 Q. And in your experience with Mr. Chavez and
18 being high, do you think Mr. Chavez was telling you
19 the truth?

20 A. Yes, I do.

21 Q. I think Mr. Burke and Mr. Granberg asked
22 you about the timing of these statements. Do you
23 remember that?

24 A. Yes.

25 Q. Is it a little bit difficult for you to

1 recall exactly what day or even exactly what year
2 these happened?

3 A. Yes, it is.

4 Q. But these conversations did happen, right?

5 A. Yes, they did.

6 Q. And if you were presented with paperwork
7 that showed when you were out of prison, when Mr.
8 Troup was out of prison, when Mr. Chavez was out of
9 prison, Mr. Amador was out of prison, would that
10 paperwork help you maybe get a better recollection of
11 when these events happened?

12 A. Yes.

13 Q. But you haven't looked at that before
14 coming today, right?

15 A. No.

16 MR. BECK: May I have a moment, Your Honor?

17 THE COURT: You may.

18 MR. BECK: Nothing further, Your Honor.

19 THE COURT: Thank you, Mr. Beck.

20 Let me let Mr. Castle go first, then I'll
21 let you, Mr. Burke. Go ahead, Mr. Castle.

22 REDIRECT EXAMINATION

23 BY MR. CASTLE:

24 Q. Mr. Quintana, when did you leave Southern
25 in 2001, do you know?

1 A. January 3.

2 Q. So --

3 A. Approximately the 3rd or the 6th,
4 discharged.

5 Q. Did the murders of Looney and Pancho, did
6 the word of that spread fairly quickly through the
7 prison system?

8 A. They knew ahead of time that Looney was one
9 of the ones going to be hit, before I even left.

10 Q. So you knew already in the January of 2001
11 that Looney -- was it Looney or Pancho was going to
12 get hit?

13 A. Looney.

14 Q. Okay. Now, did you know anything about
15 Pancho being murdered?

16 A. No.

17 Q. So you found -- my original question was:
18 When they were murdered, did you hear about it
19 through the prison grapevine, like, almost
20 immediately?

21 A. Once it happened -- I was on the streets --
22 I seen it on the news.

23 Q. Okay. Now, how did you know that Looney
24 was going to be killed?

25 A. Because there was many discussions about it

1 before; that he was an LCer before he was an SNM
2 member.

3 Q. And who did you have discussions with in
4 the Southern facility, in 2001?

5 A. It wasn't in the Southern facility. I was
6 talking to Angel Munoz on the streets while I was out
7 on parole.

8 Q. Okay. So did you know that Angel Munoz
9 wanted him dead?

10 A. I didn't know that.

11 Q. So would this have been in 2001? When you
12 got out in January, you would have talked to him?

13 A. 1999, and I went back in in 2000, February.

14 Q. How about when you got out in January of
15 2001, would you have talked to Angel Munoz during
16 that time period?

17 A. No.

18 Q. You indicated that when you left the
19 facility in 2001, the person that held the keys was a
20 person by the name of Lino; is that right?

21 A. Yes, when I got to -- when I was in Santa
22 Rosa prison, I was instructed -- I talked to Angel on
23 the phone -- to go to Southern New Mexico
24 Correctional Facility and take the car away from Lino
25 Giron, and give it to someone else, because Wild Bill

1 was on his way over there, and it was going to be his
2 yard, so there wasn't no friction on the yard when he
3 got there.

4 Q. So who instructed this?

5 A. Angel Munoz did.

6 Q. So who was it that you were supposed to
7 give the keys to?

8 A. I give it to Tibo.

9 Q. Who is that?

10 A. I know his last name is Chavez. I didn't
11 know his first name.

12 Q. Nick Chavez?

13 A. Yes.

14 Q. How about Leroy Lucero, was he the
15 right-hand man of Lino Giron?

16 A. No.

17 MR. BECK: Objection, Your Honor. I think
18 we're getting a little far afield.

19 THE COURT: How is this related?

20 MR. CASTLE: I'm just exploring what the
21 Government brought up. It, frankly, has nothing to
22 do with our motion. I confess that it doesn't.

23 THE COURT: Well, why don't we rein it in
24 then.

25 MR. CASTLE: I have no other questions

1 then.

2 THE COURT: Thank you, Mr. Castle.

3 Mr. Burke.

4 EXAMINATION

5 BY MR. BURKE:

6 Q. Mr. Quintana, Mr. Beck asked you if you had
7 heard from other people about Edward Troup, and you
8 said "several," but then you only mentioned one, and
9 that was Javier Alonso, known as Wino, right?

10 A. Yes.

11 Q. So that's one other person you remember
12 mentioning it to you, right?

13 A. Yes.

14 Q. And where was it that you talked to Javier
15 Alonso that he said something about Edward Troup?

16 A. We were at the North facility together.

17 Q. And when was that, sir?

18 A. Just recently.

19 Q. And by "recently," like last week?

20 A. No, about a few months back, a couple
21 months.

22 Q. So two months back. So we're in April, so
23 February he would have told you that. And what cell
24 is he in?

25 A. He was in cell number 9.

1 Q. Are you in the same unit as he is?

2 A. Yes.

3 Q. All right. And how is it that you two
4 started talking?

5 A. We were reading our Bible together.

6 Q. All right. And in the middle of some
7 passage from Luke, he said: By the way, let me tell
8 you about Freddie Sanchez?

9 A. No, it wasn't a passage from Luke. It was
10 just something he said he finally felt better that he
11 could get it off his conscience, because it was
12 bugging him.

13 Q. So you're in the middle of a Bible study,
14 and his conscience is bothering him, and he just
15 wants to unburden himself, and he said: By the way,
16 I killed Fred Dawg?

17 A. No.

18 Q. What did he say?

19 A. He said that he dropped out of the SNM a
20 long time ago due to the fact that he didn't feel it
21 was right what they had him do to Fred Dawg.

22 Q. Okay. And then somehow he blurted out to
23 get this off of his chest, "and Edward helped me"?

24 A. He said him and Edward Troup went in there
25 and did it together.

1 Q. All right. And did he mention the Rascon
2 brothers?

3 A. No.

4 Q. All right. Thank you.

5 Let me go back now to the grocery store
6 conversation. What time of day was that?

7 A. I'm not sure.

8 Q. All right. Was it like over the lunch hour
9 or something?

10 A. I'm not sure.

11 Q. You don't know. Was it in the morning?

12 A. No.

13 Q. Was it at night?

14 A. If I told you a specific time, I'd be
15 lying.

16 Q. And you don't want to lie?

17 A. No.

18 Q. Okay. And so just trying to narrow it
19 down, when did you go back into prison? Was it 2015
20 sometime?

21 A. In September sometime when I got picked up
22 on this case.

23 Q. In September of '15. Were you out all of
24 '15, until you got picked up on this case?

25 A. I went in on a couple of parole violations

1 back to federal prison, but that was it.

2 Q. In federal prison?

3 A. Yes.

4 Q. The BOP?

5 A. Yes.

6 Q. And that's where Edward's brother had the
7 hit maybe put on him?

8 A. Yes.

9 MR. BURKE: Okay. All right. Thank you.
10 That's all I have.

11 THE COURT: Thank you, Mr. Burke. Any
12 other defendant have any questions?

13 All right. Mr. Quintana, you may step
14 down. Is there any reason that Mr. Quintana cannot
15 be excused from the proceedings? Mr. Castle?
16 Mr. Burke?

17 MR. CASTLE: No, Your Honor.

18 THE COURT: Anyone else? Mr. Beck?

19 MR. BECK: He may be excused.

20 THE COURT: All right. You're excused from
21 the proceedings. Thank you for your testimony.

22 Thank you for your assistance, Mr. Sapien.

23 MR. SAPIEN: Thank you, Your Honor.

24 MR. CASTELLANO: Your Honor, the defense
25 calls its next witness, if it's an SNM Gang member,

1 I'd just like to note an observation for the record,
2 that not one of the statements taken before the Court
3 this afternoon was a co-conspirator statement. Now,
4 this was supposedly tied to Document 1909, which is
5 related to James statements. Not one of those dealt
6 with a co-conspirator statement.

7 Now, they may have been statements against
8 interests, and other types of statements, but this is
9 the concern that we had, is that -- in this case it
10 would be like taking a deposition pretrial, and
11 getting a free shot at the witnesses. If the Court
12 noticed, not one of those was a co-conspirator
13 statement.

14 THE COURT: I don't think they've ever
15 contended that that was the purpose of this hearing.
16 Their purpose is they're challenging whether these
17 are statements against interests. And there is,
18 what, six statements? I know the list may be growing
19 a little bit, but it was four; I think it's now six.

20 MR. CASTELLANO: Counsel referred to
21 Document 1909. That is their filing related to the
22 Jencks.

23 THE COURT: But I think that's where they
24 raised -- correct me if my memory is off -- isn't
25 that where you raised these -- say, while we're doing

1 these, we want to challenge these statements against
2 interests? Isn't it at the back of that document,
3 Mr. Castle?

4 MR. CASTLE: Yes, it is. The first
5 paragraph indicates that we're objecting to U.S.
6 notice of James statements. And it says, "And
7 objections to specific target statements not
8 referenced in the Government's notice."

9 THE COURT: Then you have about four there?

10 MR. CASTLE: Yes.

11 THE COURT: So I think that's the reason
12 it's getting referenced. I think everybody is in
13 agreement these aren't going to come in as
14 co-conspirator statements. These are ones that the
15 Government is trying to get in as statements against
16 interests.

17 MR. CASTELLANO: All right. So, as best as
18 we can, if we can have a proffer beforehand about
19 what statements they're referring to, I think that
20 would help focus the proceedings.

21 THE COURT: Okay. Mr. Cooper, do you have
22 the next --

23 MR. COOPER: I do, Your Honor. We would
24 call Josh Mirka to the stand.

25 MR. BECK: And, your Honor, I think this is

1 a perfect example. There is no statement in there
2 about Billy Garcia. So the United States would ask
3 for a proffer about what statement they're trying to
4 attack.

5 MR. COOPER: Your Honor, there is a
6 statement that Bill Garcia runs the car. And we want
7 to explore whether or not he was running the car.

8 THE COURT: Okay.

9 MR. BECK: And --

10 THE COURT: All right. Is Mr. Mirka in
11 custody?

12 MR. COOPER: He's on his way up.

13 THE COURT: Is he represented by counsel?

14 MR. COOPER: She was here this morning,
15 Your Honor. Ms. Gibson.

16 MS. ARMIJO: She was here this morning and
17 I'm sure she wants to be here.

18 MR. COOPER: We'll call her, Your Honor.

19 THE COURT: All right. If she's not in the
20 building, do you have somebody else you want to maybe
21 go to?

22 MR. COOPER: May I have just a moment, Your
23 Honor?

24 THE COURT: You may.

25 MR. CASTLE: We'd call Agent Andrew Armijo,

1 and it would be on the issue of the motion to
2 dismiss, 1283, I believe is the number. Yes.

3 THE COURT: All right. Mr. Armijo.

4 THE WITNESS: Yes, sir.

5 THE COURT: All right. Mr. Castle. Let me
6 have you sworn in first.

7 ANDREW J. ARMIJO,
8 after having been first duly sworn under oath,
9 was questioned and testified as follows:

10 DIRECT EXAMINATION

11 THE CLERK: Would you state your name and
12 spell your last name.

13 THE WITNESS: My name is Andrew J. Armijo,
14 A-R-M-I-J-O.

15 THE COURT: Mr. Armijo. Mr. Castle.

16 BY MR. CASTLE:

17 Q. Mr. Armijo, how are you employed?

18 A. I am retired.

19 Q. Prior to retiring, how were you employed?

20 A. I was Special Agent for the FBI for 21 and
21 a half years.

22 Q. And when did you retire?

23 A. December of 2010.

24 Q. Prior to that time, were you ever assigned
25 as an agent here in New Mexico?

1 A. Yes.

2 Q. From during what period of time?

3 A. It would have been 1997, I believe, to the
4 end of my career in 2010.

5 Q. During that time period, did you ever work
6 on investigations that focused on the prison gang,
7 the SNM?

8 A. Yes, I did.

9 Q. And do you recall when you first started
10 working on investigations of that particular prison
11 gang?

12 A. If I recall correctly, it was probably
13 early 2000, May, April, somewhere around there, I
14 guess.

15 Q. What brought that gang to the attention of
16 the FBI at that time?

17 A. It was a known gang that was born in the
18 prison system here in New Mexico in 1980 after a
19 riot. It was a viable target. We knew that they
20 were involved in some things that we were interested
21 in.

22 Q. In 2000, 2001, where were you stationed?

23 A. Here in Las Cruces, New Mexico.

24 Q. So would your investigation have included
25 crimes that the SNM may have committed at the

1 Southern New Mexico Correctional Facility?

2 A. Yes, it did.

3 Q. In 2001, when you began your investigation,
4 was it just the FBI alone, or were you working with
5 the Department of Corrections, the State Police, a
6 joint task force, things of that nature?

7 A. It was a gang task force. And I think the
8 participants were the FBI, the Dona Ana County
9 Sheriff's Office, and the Las Cruces Police
10 Department.

11 Q. Am I correct that the names of the task
12 forces sometimes change, or are they always the same?

13 A. No, this one, I believe, it was the same
14 throughout.

15 Q. What was the name of that task force?

16 A. The New Mexico -- Southern New Mexico Gang
17 Task Force, I think. I believe that was it.

18 Q. Did it have a regional area in the State of
19 New Mexico that it looked at?

20 A. Just the Southern part of the state.

21 Q. So it wouldn't include Albuquerque and the
22 northern part of the state?

23 A. Actually, as far as our jurisdiction, it
24 would cover the whole, since our headquarters is in
25 Albuquerque, so we would coordinate with our

1 Albuquerque office as well.

2 Q. Was there also a central New Mexico gang
3 task force?

4 A. Not I'm aware of.

5 Q. During the investigation, starting in 2000,
6 what was the FBI's role in, I guess, the
7 investigation of the SNM?

8 A. Well, what we wanted to do was establish an
9 intelligence file for the SNM, the Sindicato de Nuevo
10 Mexico. And what we were trying to do is establish
11 predicate offenses, which would include murder,
12 extortion, kidnapping, drug dealing, anything like
13 that, so that later on we could go and investigate
14 them fully, so the full extent of the law under RICO.

15 Q. So the idea was to develop evidence that
16 could possibly be used by the United States
17 Attorney's Office in an indictment under either RICO,
18 or perhaps VICAR?

19 A. Yes.

20 Q. After you began your investigation in 2000,
21 did it come to your attention that a pair of murders
22 happened on the same day at the Southern Correctional
23 Facility?

24 A. Yes.

25 Q. I'm using the Southern Correctional

1 Facility as short for a longer name. But it's the
2 Southern New Mexico Correctional Facility, right?

3 A. Right.

4 Q. I just seem to always mess that name up
5 when I say it, so I'll just call it Southern.

6 Did you know about it fairly quickly after
7 it happened?

8 A. Actually, I read about it in the paper.
9 And then we followed up with the trying to gain some
10 intelligence. I know the jurisdiction was with the
11 New Mexico State Police. They had a full-fledged
12 investigation going on, the murder of two gentlemen.

13 Q. When you said there was some intelligence
14 that you were, I guess, trying to gather; is that
15 right?

16 A. That's correct.

17 Q. What kind of formats would that take?

18 A. That would take any type of reports from
19 the New Mexico Correctional Department, the local PD,
20 if possible, or the State Police.

21 Q. Would it also include perhaps using assets,
22 informant assets of the FBI, that might have
23 information about the SNM?

24 A. At that time, I don't think we had any
25 asset into, or informant into the Sindicato de Nuevo

1 Mexico.

2 Q. Was the New Mexico Department of
3 Corrections reluctant to share information with the
4 FBI during that time period?

5 A. No.

6 Q. All right. So would you get reports? In
7 other words, did you get discovery? Well, we would
8 call it discovery, but police reports that filled you
9 in on the details of the murders.

10 A. Actually, we would solicit those reports.
11 As a matter of fact, I can recall traveling up to
12 Santa Fe, and picking up a couple reports.

13 Q. Did you open up an investigation, a file, I
14 guess, on the 2001 murders?

15 A. We opened up an intelligence file, a
16 racketeering enterprise investigation. And we also
17 opened up a sister file for the eventual prosecution
18 of the SNM.

19 Q. How long did those files remain open, or
20 did they ever close?

21 A. I don't believe they have closed. I think
22 it's still an ongoing investigation.

23 Q. When did you say you retired? Was it 2010?

24 A. 2010.

25 Q. So between 2001 and 2010, if you came

1 across information related to those murders, would
2 you place that information in the files that we just
3 talked about?

4 A. Well, I had transferred over to the other
5 side of the house -- I was working for a
6 counterintelligence and counterintelligence matters
7 about 2006, '07, somewhere around there.

8 Q. Did a particular agent take over your job?

9 A. I believe that would have been Bryan Acee,
10 because he was here in Las Cruces for a while.

11 Q. And then did he leave and come back later
12 on in say, 2015, or do you know?

13 A. I do not know.

14 Q. He went off, and you ended up retiring in
15 2010?

16 A. Right.

17 Q. I take it at that point you kind of left
18 Bureau business aside and went on to enjoy your life?

19 A. Correct.

20 Q. Can you give us an idea -- I know we
21 subpoenaed you to bring your file, but I take it you
22 don't have a file anymore; is that right?

23 A. No, sir, I'm not privy to any of those
24 files anymore.

25 Q. Can you give us an idea of what the size of

1 the file was when you would have turned it over to
2 Agent Acee, whenever that was, in 2006-ish?

3 A. I know the memo to open up or the EC, the
4 electronic communication, to open up the file was
5 just simply one that would identify separate
6 subfiles. And it would be a background 302, an
7 insert, and then the backgrounds would include the
8 main players. So it could be -- and I can't recall
9 who all we had, as far as in those background files.
10 But they were clearly labeled as BC-1 through
11 whatever it was. I can't recall.

12 Q. So those would be assigned to an individual
13 that might be either a target or a source?

14 A. No, that would be a member of the SNM.

15 Q. So the FBI, during this time period, was
16 keeping files on particular individuals who had been
17 identified as SNM members?

18 A. Yes. One of the things that you try and do
19 is establish who the rank and file are of the
20 Sindicato de Nuevo Mexico, and who are the leaders of
21 the organization itself.

22 Q. So those subfiles, what did you call them?

23 A. Background. And B, as in Bravo, C as in
24 Charlie.

25 Q. So B files? I'm sorry?

1 A. B, as in Bravo, C as in Charley.

2 Background files.

3 Q. Okay. It wasn't some secret --

4 A. No. I apologize.

5 Q. Okay. Then, if interviews had been
6 conducted with confidential sources over the years,
7 would those be in separate files?

8 A. I never conducted a confidential source
9 interview of anyone. You would have to address Bryan
10 Acee, or the other gentlemen up in Albuquerque that
11 were involved in the case.

12 Q. Were there other agents out of the Southern
13 Task Force that were doing confidential interviews
14 with informants?

15 A. Not that I was aware of.

16 Q. You said there were a number of agencies.
17 How many investigators of sorts were part of this
18 task force?

19 A. I would say probably three or four at a
20 given time.

21 Q. Okay. And the names might change, but that
22 would be about that number?

23 A. Correct.

24 Q. And those would be somebody from the FBI,
25 somebody from Corrections, and then somebody else

1 from another law enforcement agency?

2 A. Actually, we didn't have anybody from
3 Corrections. It would have been just from Las Cruces
4 PD and the Dona Ana County Sheriff's Office.

5 Q. Okay. Corrections worked outside, then,
6 outside of the task force?

7 A. Yes, I believe so, yes.

8 Q. But they would work cooperatively, in the
9 sense that they would pass on reports and things of
10 that nature?

11 A. Yeah, if we solicited them, yes.

12 Q. So if the FBI wanted anything, they'd give
13 it to you?

14 A. Yes.

15 Q. You don't recall any refusals by them to
16 share information?

17 A. No.

18 Q. During the investigation in 2012, do you
19 recall an individual by the name of Edgar Rosa being
20 a member of the task force?

21 A. Yes I do.

22 Q. Who was he?

23 A. He was a Las Cruces Police Department
24 Officer, or detective, I'm not sure. I think he was
25 just a patrol officer at the time.

1 Q. I want to show you a document, if I could.

2 A. Sure.

3 Q. Prior to coming in today, were you shown a
4 few documents so you could familiarize yourself prior
5 to testifying?

6 A. Yes.

7 Q. I'm hoping this was one of them, if you can
8 look at the screen. I don't know if you can see
9 clear enough. If you can't, I can let you have my
10 laptop.

11 A. That's good.

12 MR. BECK: Is it an exhibit?

13 MR. CASTLE: I don't know.

14 Q. Does that document -- did you have an
15 opportunity to look at that document?

16 A. Yes, I did, just now.

17 Q. And just for the record, it's marked as
18 Bates stamp 606. Is that your name at the bottom?

19 A. That is correct.

20 Q. So you would have drafted that report?

21 A. In conjunction with Mr. Rosa.

22 Q. So when you say "in conjunction," you would
23 have drafted it, but you would have got the
24 information from Task Force Officer Rosa?

25 A. Correct. That would have been from

1 Mr. Moore at Southern New Mexico Correctional
2 Facility.

3 Q. And what's the date of the report?

4 A. April 10th, 2001.

5 Q. So this would be an example of a report
6 where you were documenting the fact that Department
7 of Corrections was providing information to the task
8 force concerning the murders that happened at the
9 facility in 2001?

10 A. Yes, that's correct.

11 Q. Thank you. I'm going to show you another
12 document, which is Bates stamped 14202. Disregard
13 the yellow highlighting, because I don't think that
14 was there before I looked at the document. But do
15 you recognize that as an FBI document of some sort, a
16 302?

17 A. That is correct.

18 Q. And again, is this a document that you're
19 familiar with, at least at this point in time?

20 A. Yes.

21 Q. And was this an investigation that began
22 April 30, 2001?

23 A. Let's see. Yes, that's correct.

24 Q. Now, would that have been a report that you
25 would have documented information that had been given

1 to you from the Corrections Department about the
2 murders that happened?

3 A. Yes. I recall going up to Santa Fe and
4 acquiring that information.

5 Q. Were there some meetings up in Santa Fe,
6 where they did kind of brainstorming on what to do
7 about these murders and the SNM, in general?

8 A. As I said, the jurisdiction was held by the
9 New Mexico State Police. And the Department of
10 Corrections was providing all that information to
11 them, as far as coordination with them. That would
12 probably have been done between the State Police and
13 them. As far as a preliminary investigation that we
14 had going, we really never sat down and coordinated
15 what avenue we were going to take. We were trying to
16 develop our Intel for the SNM.

17 Q. Do you recall whether you attended, in
18 2001, any meetings with U.S. Attorney's Office
19 members concerning a possible RICO investigation in
20 the SNM?

21 A. No, I don't recall.

22 Q. When you say that, do you think it didn't
23 happen, or you don't know whether -- I mean, it's
24 been a long time.

25 A. I don't think it happened.

1 Q. Okay. That's fair enough.

2 A. I would have probably written a prosecutive
3 report to the file in order for them to review.

4 Q. So I know -- I may have asked this
5 earlier -- you were talking about files. Are they
6 paper files or are they electronic?

7 A. They're paper files.

8 Q. Okay. So just your memory, was it an
9 accordion file, or was it a little tiny file, or was
10 it a file drawer, or --

11 A. Probably about that big.

12 Q. Okay, about six to eight inches?

13 A. Yeah. And that would include all the
14 subfiles as well.

15 MR. CASTLE: If I could have a moment?

16 THE COURT: You may.

17 MR. CASTLE: I have no other questions.

18 THE COURT: Thank you, Mr. Castle.

19 Mr. Burke? None? Anybody else have
20 questions of Mr. Armijo?

21 How about you, Mr. Beck, do you have --

22 MR. BECK: I do, Your Honor.

23 THE COURT: -- cross-examination of Mr.
24 Armijo?

25

1 CROSS-EXAMINATION

2 BY MR. BECK:

3 Q. I guess it's "Mr. Armijo" now, no longer
4 Special Agent?

5 A. It happens.

6 Q. Mr. Armijo, I think I'll start from the
7 beginning here with some of my notes.

8 It sounds like on the Southern New Mexico
9 Gang Task Force, the agencies involved were the
10 FBI --

11 THE COURT: I hate to do this to you, Mr.
12 Beck, but I didn't realize that we were right up on
13 the break. I'm sorry, I thought we had a few more
14 minutes. I need to give Ms. Bean a break, and I need
15 to call Ms. Wild. So we'll take about 15 minutes.

16 (The Court stood in recess.)

17 THE COURT: All right. We'll go back on
18 the record. Do we have an attorney for each
19 defendant?

20 All right. Mr. Armijo, I'll remind you
21 that you're still under oath. Mr. Beck, if you wish
22 to begin your cross-examination of Mr. Armijo?

23 MR. BECK: Thank you, Your Honor.

24 THE COURT: Mr. Beck.

25 Q. So Mr. Armijo, I just want to make sure.

1 The Southern New Mexico Gang Task Force in 2001
2 included the FBI; is that right?

3 A. Yes.

4 Q. Dona Ana County Sheriff's Office?

5 A. Yes.

6 Q. And then the Las Cruces Police Department?

7 A. Yes.

8 Q. And that's all that were agencies working
9 on the task force?

10 A. That is correct.

11 Q. I think you talked about, in 2000, the
12 FBI's involvement with the SNM Prison Gang was to
13 establish an intelligence file; is that correct?

14 A. That is correct.

15 Q. And you said -- outside of that, I think
16 you said you opened one other file into the SNM?

17 A. Yes.

18 Q. And maybe I'm saying that wrong. Do you
19 open an intelligence file, or is it just a file
20 that's a placeholder for intelligence that you got?

21 A. The file that we opened was a racketeering
22 enterprise investigation. And so that, in itself,
23 was the intel file. The other markings on the 302 --
24 the 166, I guess it is, the classification, 166E --
25 that is to the main file itself. So those two are

1 mirror images of the same.

2 Q. Okay. So mirror images; so you had two
3 files, but they contained the same documents?

4 A. That is correct.

5 Q. And during your work on the SNM, those were
6 the only two files or the only one file that you
7 worked on; is that right?

8 A. That is correct.

9 Q. And how long did you work on the
10 investigation into the SNM?

11 A. Well, considering the other duties that I
12 had as far as other investigations, I guess until I
13 transferred over into the other side of the house
14 doing foreign counterintelligence and
15 counterintelligence, that would probably have been
16 2005, 2006, somewhere around there.

17 Q. And from 2000 to 2005, 2006, whenever you
18 transferred over, was there anyone else in the
19 Southern New Mexico Gang Task Force -- if I have that
20 name correctly -- was there any other FBI officer
21 investigating the SNM, to your knowledge?

22 A. To my knowledge, I know that when Bryan
23 Acee came into the Las Cruces resident agency, he may
24 have, but I'm not sure.

25 Q. Do you know that he did, or are you sort of

1 guessing?

2 A. I assume that he did.

3 Q. And when did Special Agent Acee come into
4 the FBI?

5 A. That's -- I would assume probably 2005,
6 somewhere around there.

7 Q. So about the time, give or take, that you
8 moved over -- I think you said over to the other side
9 of the house?

10 A. Yes.

11 Q. And if Special Agent Acee said that he
12 began investigating the SNM enterprise, or the SNM
13 Gang in 2015, for the first time, would that --

14 MR. CASTLE: Objection, Your Honor. I
15 don't think -- well, first of all, I think it's a
16 violation of the rule.

17 And second of all, I think there is lack of
18 foundation with this witness that he knows what Agent
19 Acee testified about.

20 THE COURT: Well, I'll let him answer the
21 question. I don't think it violates any of the rule
22 or anything to ask him whether he agrees or not.
23 Overruled.

24 Q. If Special Agent Acee said that the first
25 time he began investigating the SNM was in 2015,

1 would that surprise you?

2 A. If that's his testimony, I would assume
3 that's correct.

4 Q. In your investigation into the SNM, from
5 2000 to 2005 or 2006, am I correct that you did not
6 ever open a confidential informant?

7 A. No.

8 Q. And even if you didn't open a confidential
9 informant, you didn't have a confidential informant
10 for the SNM investigation during that time, right?

11 A. No, I did not.

12 Q. If I understand your testimony correctly,
13 there was no one from the Corrections Department on
14 the Southern New Mexico Gang Task Force, right?

15 A. No, there was not.

16 Q. And as far as the FBI was concerned, the
17 New Mexico State Police was leading the investigation
18 into the double homicide at the Southern New Mexico
19 Correctional Facility, right?

20 A. That's correct.

21 Q. So when you talked about soliciting files
22 from Corrections, would that have been the FBI
23 soliciting files from Corrections, or New Mexico
24 State Police soliciting files from Corrections?

25 A. I know that we solicited information from

1 the Corrections Department. I would assume that the
2 State Police did so as well in their investigation.

3 Q. Okay. That answers my question.

4 And you said that when Mr. Castle was
5 asking you these questions, you said if the FBI
6 wanted anything, Corrections would give it to you,
7 right?

8 A. Yes.

9 Q. If the FBI -- if you wanted anything from
10 the Albuquerque Police Department, would they give it
11 to you?

12 A. Yes, through our Albuquerque office, with
13 our liaison up there.

14 Q. If you wanted anything -- who did you work
15 with down here? Maybe the Deming Police Office? Is
16 that a thing? I don't really know Deming. But is
17 there a Deming police?

18 A. Yes, there is a Deming Police Department.

19 Q. And if you needed something from the Deming
20 Police Department for an investigation, would they
21 give it to you?

22 A. In this case, or in any --

23 Q. Any case, while you were working.

24 A. Yes, absolutely.

25 Q. If you needed something from the Hatch

1 Police Department in an FBI investigation, would they
2 give it to you?

3 A. Yes.

4 Q. If you needed something from Socorro Police
5 Department, would they give it to you?

6 A. Yes.

7 Q. If you needed something from the Dona Ana
8 County Jail, would they give it to you?

9 A. Yes.

10 Q. And you don't consider any of those joint
11 prosecutions into the crimes that you're asking them
12 for documents generally, do you?

13 A. No.

14 Q. When you said -- I think you talked about
15 Special Agent Acee on direct, that he took your
16 position -- did he come to the FBI to take the
17 position that you had down here? Is that your
18 understanding of how he was hired down here at the
19 Las Cruces?

20 A. No, he was the first office agent down
21 here. He was just transferred here out of Quantico.

22 Q. Okay. But he didn't take your place in the
23 SNM investigation, he just came to the office; is
24 that right?

25 A. That is correct.

1 Q. And I think I understood you to say that as
2 far as you were aware, no other agents on the
3 Southern New Mexico Gang Task Force, at least that
4 you're aware of, interviewed any confidential
5 informants, right?

6 A. That I'm aware of, no.

7 Q. As far as you know, you never presented any
8 SNM crimes for prosecution to the U.S. Attorney's
9 Office, right?

10 A. No, I did not.

11 MR. BECK: May I have a moment, Your Honor?

12 THE COURT: You may.

13 MR. BECK: Nothing further, Your Honor.

14 THE COURT: All right. Thank you, Mr.

15 Beck.

16 Any redirect by the defendant, Mr. Castle?

17 MR. CASTLE: No, Your Honor.

18 THE COURT: How about you, Mr. Burke?

19 Anybody?

20 MR. BURKE: No, Your Honor.

21 THE COURT: All right. Mr. Armijo, you may
22 step down. Is there any reason Mr. Armijo cannot be
23 excused from the proceedings, Mr. Castle?

24 MR. CASTLE: No, Your Honor.

25 MR. BECK: No, Your Honor.

1 THE COURT: All right. You may be excused
2 from the proceedings. Thank you for your testimony.

3 All right. Do we have Ms. Gibson back?
4 No? Not yet?

5 MR. COOPER: Your Honor, she came in and
6 apparently thought that it was okay for her to leave
7 and go back to T or C, so that is what she has done.

8 THE COURT: Is she on her way back here?

9 MR. COOPER: She's not coming back until
10 tomorrow. She said she's got other things to attend
11 to. So we would call Edgar Rosa to the stand.

12 THE COURT: All right. And who is Edgar
13 Rosa?

14 MR. COOPER: He's a task force officer,
15 Your Honor.

16 THE COURT: Is this in support of your
17 motion to dismiss?

18 MR. COOPER: It is.

19 THE COURT: Mr. Rosa, if you'll come up and
20 stand next to the witness box on my right, your left,
21 before you're seated, my courtroom deputy, Ms. Bevel,
22 will swear you in.

23
24
25

1 EDGAR ROSA,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE CLERK: Please be seated and please
6 state your name for the record.

7 THE WITNESS: My name is Edgar Rosa.

8 BY MR. COOPER:

9 Q. Mr. Rosa, can you tell me how you're
10 employed today?

11 A. I'm a lieutenant with the Las Cruces Police
12 Department.

13 Q. In 2001, you were a task force officer
14 member?

15 A. That's correct.

16 Q. And were you a Las Cruces PD assigned to
17 that task force?

18 A. Yes, I was.

19 Q. What was the name of that task force?

20 A. Southern New Mexico Gang Task Force.

21 Q. And what agencies were members of that task
22 force?

23 A. The FBI, Las Cruces Police Department, Dona
24 Ana County Sheriff's Office.

25 Q. And what was the name of the task force

1 again?

2 A. The Southern New Mexico Gang Task Force.

3 Q. And what was the purpose of that task
4 force?

5 A. It was a joint task force put together to
6 investigate crimes of various natures involving
7 gangs.

8 Q. Okay. At some point in time, did you ever
9 focus on prison gangs?

10 A. I personally did not, no.

11 Q. Did the task force?

12 A. Yes, they did.

13 Q. Did you ever do any investigation, talk to
14 any sources with regard to the Sindicato de Nuevo
15 Mexico?

16 A. I spoke with prison officials at one point
17 during the criminal investigation that was being
18 conducted by New Mexico State Police.

19 Q. And which criminal investigation was that?

20 A. It was a double homicide that had occurred
21 at Southern New Mexico Correctional Facility.

22 Q. And do you remember the names of the two
23 individuals that were killed?

24 A. No, I do not.

25 Q. Was it Garza and Castillo; that ring a

1 bell?

2 A. I don't know.

3 Q. Too long ago?

4 A. Yes.

5 Q. In connection with that investigation, did
6 you have occasion to ever interview any confidential
7 sources, do you recall?

8 A. No, I do not recall.

9 Q. I'd like to show you what is document Bates
10 No. 3032 for identification purposes. Can you look
11 at that document. It's going to come up.

12 Mr. Rosa, would you look at that document
13 for a moment. Are you the same Edgar Rosa that's
14 identified in that document?

15 A. I am.

16 Q. And back in April of 2001, apparently on
17 April the 3rd, you would have interviewed a
18 confidential source; is that correct?

19 A. A source, correct.

20 Q. A source. And do you know where you
21 interviewed that source?

22 A. Unless I wrote it on this document, I don't
23 recall.

24 Q. Do you know who that source is?

25 A. No, I do not.

1 Q. In that document it says that Billy Garcia
2 had a green light on him, right?

3 A. Yes, it does.

4 Q. And it also says that Garcia was
5 responsible for giving the order to have Bobby Ortega
6 killed; correct?

7 A. That's correct.

8 Q. Do you know where that source got that
9 information?

10 A. I do not.

11 Q. In there it also says that Mr. Garcia is
12 not associated with the SNM.

13 A. Show me where that is.

14 Q. It's next to the last line from the bottom,
15 "Source stated Garcia was not associated with the
16 SNM"?

17 A. That's correct.

18 Q. And it says, "Garcia did not have approval
19 of veteran members of the SNM for the hit"?

20 A. That's correct.

21 Q. How am I supposed to determine who that
22 source is? Is there a method for me? Is there a
23 place where I can go, a log or something, to tell me
24 who that source is?

25 A. The best of my recollection, this document

1 was put together as an intel resource for --
2 basically, to support what was going on at that time.
3 The focus was on the Sindicato de Nuevo Mexico. The
4 sources I listed on the top stated that they were not
5 in the position where they were willing to testify.
6 So when we put together documents like this, this
7 source could have come from inside the prison,
8 outside the prison, so on. And at this time I don't
9 recall who or what that source was.

10 Q. Okay. But thinking back to what was going
11 on in 2001, did you put the identification of that
12 source in a separate file someplace?

13 A. No, I did not. I don't recall if I did or
14 not.

15 Q. Okay. Can you tell, looking at the
16 document, where -- what sort of distribution this
17 document had?

18 A. No, I'm not familiar with the FBI method of
19 distributing their memos.

20 Q. Did you prepare this document?

21 A. Yes, I did.

22 Q. What else did you do in 2001 relative to
23 the investigation of the double homicide?

24 A. I was in a position just, basically, to
25 gather intel in any kind of information that may have

1 been coming from the streets, or from wherever, just
2 to make sure that it went up the pipeline to the New
3 Mexico State Police investigators. But other than
4 that, I had no interaction with the actual criminal
5 investigation itself.

6 Q. Did you do anything to further investigate
7 the allegations contained in this document?

8 A. No, I did not.

9 Q. DeLeon 597, please. Do you know Captain
10 Henry Telles?

11 A. Yes, I do.

12 Q. How do you spell his last name? Is it with
13 an S or a Z?

14 A. I don't recall, sir.

15 Q. And who is Captain Henry Telles?

16 A. He was an employee of the Southern New
17 Mexico Correctional Facility.

18 Q. I'd like you to look at the monitor, if you
19 will. And we are looking at Document 597 for
20 identification purposes. Mr. Rosa, did you prepare
21 that document?

22 A. I don't see my initials on it.

23 Q. So reading the first line, do you recall it
24 says, "The Task Force Officer Edgar Rosa met with
25 Captain Henry Telles, Southern New Mexico

1 Correctional Facility, and was provided the following
2 information"?

3 A. That's correct.

4 Q. "Telles said that an inmate, Patricio
5 Esquibel, is a validated member of SNM. Telles also
6 stated that Alfred Giron, Sexy Walker, was relieved
7 to be transferred out of state. Giron had a
8 difficult time controlling the younger members of the
9 SNM." Do you recall that conversation or that bit of
10 information?

11 A. No, I do not.

12 Q. "Telles stated that Leroy Lucero, also
13 known as Smurf, is currently running the SNM at the
14 Southern New Mexico Correctional Facility." Do you
15 know where Mr. Telles got that information?

16 A. No, I do not.

17 Q. It goes on to say that "Lucero is supported
18 by an advisory board. The members are Alex Munoz,
19 Frank Castillo, and Joe Gallegos." Do you know where
20 that information came from?

21 A. No, I do not.

22 Q. Did you do anything with that information
23 after Henry Telles gave it to you?

24 A. No, I did not.

25 Q. Down at the bottom it has four individuals'

1 names: Patricio Esquibel, also known as Pate; Leroy
2 Lucero, Smurf; Alex Munoz, F Trooper; and Frank
3 Castillo, Pancho. Did you ever investigate any of
4 those individuals?

5 A. No, I did not.

6 Q. Can you tell me what the date of that
7 document is?

8 A. It's initiated November 20, 2000.

9 Q. It was initiated from November 20, 2000.
10 What does that mean?

11 A. That's when the document was put together.

12 Q. Okay. There is a document title that says,
13 "2/27/01, Telles stated that inmate Patricio Esquibel
14 is a" -- something. What's the difference between
15 the initiated date and the document -- the date on
16 the document title?

17 A. As a task force officer, I was permitted to
18 put together a 302 as far as the context. As far as
19 the other labels that are on top of that document, I
20 was not responsible for those dates.

21 Q. Okay. Do you know when it was that you met
22 with Captain Henry Telles by looking at that
23 document?

24 A. It appears that it's dated 2/28 of 2001.

25 Q. But the investigation that you were working

1 on was initiated back in 2000. And that was the
2 investigation of the Sindicato de Nuevo Mexico?

3 A. The best of my recollection, this is a
4 general file of intelligence, so I don't know when
5 that particular file number was initiated, the 281 AQ
6 up on top.

7 Q. Okay. Mr. Rosa, on April the 10th, 2001,
8 do you recall meeting a source, again who was not in
9 a position to testify, and that source telling you
10 that George Manzanares was responsible for ordering
11 the killing of Frank Castillo?

12 A. I don't remember the source, sir.

13 Q. Do you remember where that conversation
14 occurred?

15 A. No, I do not.

16 Q. Did you do any investigation and any
17 interviews of sources within Southern New Mexico
18 Correctional Facility back in 2001?

19 A. I don't recall, sir. I don't believe so.

20 Q. You don't believe you did?

21 A. No.

22 Q. Do you know George Manzanares?

23 A. I know of him from my contact as a Las
24 Cruces Police Department Police Officer.

25 Q. Is he from Cruces?

1 A. Yes.

2 Q. Here in the second full paragraph it says,
3 "Source stated Billy Garcia gave the order to hit
4 Castillo. Manzanares and Garcia will be killed for
5 their involvement in the killing of Castillo." You
6 don't know anything about who that source is, right?

7 A. No, I don't.

8 Q. And you don't know where I could obtain
9 information on who that source is?

10 A. I don't remember, sir. It's been 17 years.

11 Q. So like the other documents, you would not
12 have kept a log of who you talked to and their
13 identification?

14 A. No, sir.

15 Q. If this had happened -- if this trial were
16 occurring in 2001, 2002, it's likely that you would
17 know who the source was, right?

18 A. More than likely, sir, yes.

19 Q. And, likewise, same question, with regard
20 to the source in the other question?

21 A. That's correct.

22 Q. Did you investigate -- well, how long were
23 you a member of the task force?

24 A. Approximately four years.

25 Q. Ending or -- beginning and ending when?

1 A. Starting in 1997, ending in 2001.

2 Q. Sometime after these interviews -- how long
3 after these interviews did you leave the task force?

4 A. I got promoted back to the police
5 department just shortly thereafter; it was in that
6 same year.

7 Q. And once you got back to the police
8 department, did you ever conduct any investigations
9 that were relevant to SNM activities?

10 A. No.

11 Q. So everything else --

12 A. Everything remained within the jurisdiction
13 of the Las Cruces Police Department when I returned
14 back to the city police.

15 MR. COOPER: Okay. May I have a moment,
16 Your Honor?

17 THE COURT: You may.

18 MR. COOPER: Pass the witness. Thank you.

19 THE COURT: Thank you, Mr. Cooper.

20 Mr. Burke? Anybody else on the defense
21 side? Anyone else have any cross-examination of
22 Mr. Rosa. Mr. Beck?

23 CROSS-EXAMINATION

24 BY MR. BECK:

25 Q. Lieutenant Rosa, I want to go back over a

1 couple of these documents. Would you bring up Bates
2 3032, please. Do you know whether this source was an
3 SNM Gang member?

4 A. I don't recall.

5 Q. Do you see anywhere on this document that
6 it says he was an SNM Gang member?

7 A. No, I do not.

8 Q. And I know you're not a prosecutor, but
9 does this document generally say that Billy Garcia is
10 responsible for ordering a murder, specifically of
11 Bobby Ortega?

12 A. In general, yes.

13 Q. And do you know that to be an SNM Gang
14 member named Bobbalu; nicknamed Bobbalu, I should
15 say?

16 A. Bobbalu? Where do you get the Bobbalu,
17 sir?

18 Q. I'm just asking if you know that.

19 A. I don't know that.

20 Q. That's what I figured. And so do you know
21 who Billy Garcia is, a/k/a Wild Bill? Do you
22 remember that from working on the SNM prosecutions?

23 A. No, I do not.

24 Q. So you wouldn't know if he was a leader of
25 SNM at the time of the 2001 murders?

1 A. No, I would not know.

2 Q. And I think you said that you didn't do
3 anything to follow up on this information, right?

4 A. That's correct.

5 Q. How long have you been working in law
6 enforcement?

7 A. 24 years.

8 Q. And in your 24 years' experience, if you're
9 meeting with someone who is providing information, do
10 you go -- as a confidential informant, which -- let's
11 refer to this person as a confidential informant --
12 do you go on just their testimony alone, or do you
13 want to corroborate it before you move forward with
14 it?

15 A. We attempt to corroborate what he's
16 stating.

17 Q. And if this person in that last paragraph
18 says that, "Source stated that Garcia was not
19 associated with the SNM," if you interviewed other
20 SNM members, and even prison officials, and they told
21 you that Garcia was associated with the SNM, and in
22 fact he was a leader of the SNM, would that
23 corroborate or not corroborate this person's
24 statements about the SNM?

25 A. It wouldn't corroborate what he stated.

1 Q. If you're investigating the SNM, and it
2 says this person, Garcia, is not associated with the
3 SNM, but he is actually a leader in the SNM at that
4 time, would that -- in your opinion, would you find
5 this source useful for SNM information, or would you
6 think that perhaps he doesn't have much information
7 on the SNM?

8 A. I would second-guess everything he would be
9 sharing.

10 Q. All right. Can we look at Bates 597,
11 please. So it looks to me -- I probably should have
12 paid closer attention -- but it looks to me like this
13 information came from an interview with Captain
14 Telles, and not with a specific inmate or inmates?

15 A. That's correct.

16 Q. And I think here in the second paragraph --
17 well, third paragraph -- sorry, I can't count --
18 right there, that I circled with red, it says that
19 "Leroy Lucero, a/k/a Smurf, is currently running the
20 SNM at the SNMCF." Do you see that?

21 A. Yes, I do.

22 Q. All right. And do you know whether that
23 was true at the time?

24 A. I don't remember if that was true or not.

25 Q. All right. And I think you said you

1 wouldn't know if Billy Garcia was higher or lower
2 than --

3 A. I would not know.

4 Q. But if you talked to Mr. Lucero, and he
5 said that Billy Garcia was higher up in the gang at
6 that point, would you rely on his statement, at least
7 partially for that?

8 A. I would have to corroborate it as well.

9 Q. Okay, good. Fair enough.

10 All right. I'm showing you now on the
11 overhead a document. Do you see where it says,
12 "Offender Physical Location History" at the top?

13 A. Okay, yes.

14 Q. And underneath that, do you see where it
15 says, "Billy Lee Garcia"?

16 A. Yes, I do.

17 Q. Have you ever seen one of these physical
18 location history sheets before?

19 A. No, I have not.

20 Q. Do you recognize -- down at the bottom
21 here, around 2001, do you recognize the name under
22 location there, to Southern NMCF?

23 A. I believe that's a reference to the
24 Southern New Mexico Correctional Facility.

25 Q. And that's where you know that the murders

1 happened in 2001, right?

2 A. That's correct.

3 Q. And do you remember that those murders
4 happened on or about March 25 or 26 of 2001?

5 A. I don't recall when the incidents occurred.

6 Q. Okay. But looking at this, does this
7 indicate to you that Billy Lee Garcia, at least
8 according to this document, was moved to the Southern
9 New Mexico Correctional Facility on or about March 7
10 or 8 of 2001?

11 A. According to this document, yes.

12 Q. And if we could have back Bates 597,
13 please. And, again, I think you went over this in
14 your direct examination with Mr. Cooper, but it looks
15 like this interview probably happened either February
16 27, 2001 or February 28, 2001; is that fair to say?

17 A. Yes.

18 Q. And is that before March 8 of 2001?

19 A. Yes, it is.

20 Q. And so, if you found out that Billy Garcia,
21 who we saw moved down there in March of 2001, was
22 higher up in the organization than Leroy Lucero, and
23 ran the pod after he got there, would it help you
24 determine whether Leroy Lucero was running the pod in
25 March of 2001, that information help you?

1 A. It may or may not. I won't say. I can't
2 corroborate.

3 Q. Fair enough. Then, if we could go to Bates
4 605, please. Down here in the third paragraph, does
5 that say that, "The source stated that Billy Garcia
6 gave the order to hit Castillo?"

7 A. That's correct.

8 Q. And earlier on, it says that, "George
9 Manzanares was responsible for ordering the killing
10 of Frank Castillo," right?

11 A. That's correct.

12 Q. Do you know -- if you know -- the way the
13 SNM operates, that multiple people can be involved in
14 placing an order to kill another SNM member?

15 A. I do not know.

16 Q. And again, do you remember corroborating
17 any of this information from this source?

18 A. I don't remember, sir.

19 Q. Okay. And if several inmates told you that
20 Billy Garcia gave the order to kill inmate Castillo,
21 would that help you corroborate this source's
22 information?

23 A. It may.

24 Q. And if several sources didn't mention it at
25 all that George Manzanares was involved, would that

1 lead you to believe that this information about
2 George Manzanares was accurate or inaccurate, or
3 would it --

4 A. Same.

5 Q. Fair enough.

6 MR. BECK: May I have a moment, Your Honor?

7 THE COURT: You may.

8 MR. BECK: Nothing further, Your Honor.

9 THE COURT: Anyone else? Mr. Cooper, do
10 you have any redirect?

11 MR. COOPER: Briefly, Your Honor.

12 THE COURT: Mr. Cooper.

13 REDIRECT EXAMINATION

14 BY MR. COOPER:

15 Q. Looking at Document 3032, Mr. Rosa, about
16 in the middle of that first big paragraph it says,
17 "Veteran members of the Sindicato de Nuevo Mexico,
18 SNM, are unhappy with the activities of younger
19 members." You'd necessarily need to be an SNM member
20 to know that; correct?

21 A. It could come from any sources inside the
22 prison system.

23 Q. Okay. All right. A minute ago you said to
24 Mr. Beck that you would second-guess this source's
25 information if you knew to be that Billy Garcia was a

1 member of SNM; you'd think this guy really doesn't
2 have good information, right?

3 A. It depends, yes.

4 Q. And that would hold true for all of his
5 information, wouldn't it?

6 A. It may, yes.

7 MR. COOPER: Okay. Thank you.

8 THE COURT: Thank you, Mr. Cooper. Any
9 other defendant have redirect? Mr. Burke? Anyone
10 else?

11 Mr. Rosa, you may step down. Is there any
12 reason Mr. Rosa may not be excused?

13 MR. COOPER: No, Your Honor. Thank you.

14 THE COURT: Anybody else have an objection?
15 Mr. Beck? Are you okay?

16 MR. BECK: No, Your Honor, he may be
17 excused.

18 THE COURT: All right. You're excused from
19 the proceedings. Thank you for your testimony.

20 All right. Mr. Castle, Mr. Cooper, any
21 other witnesses this afternoon or --

22 MR. CASTLE: Yes, Your Honor. We would
23 call Juan Barela.

24 THE COURT: This will again be in support
25 of the motion to dismiss?

1 MR. CASTLE: It will.

2 THE COURT: Mr. Barela, if you'll come up
3 and stand next to the witness box on my right, your
4 left. Before you're seated, my courtroom deputy, Ms.
5 Bevel, will swear you in.

6 JUAN BARELA,
7 after having been first duly sworn under oath,
8 was questioned and testified as follows:

9 DIRECT EXAMINATION

10 THE CLERK: Please be seated, and please
11 state your name for the record.

12 THE WITNESS: My name is Juan Barela.

13 THE COURT: Mr. Barela. Mr. Castle.

14 BY MR. CASTLE:

15 Q. Mr. Barela, back in 2001, were you a work
16 detail supervisor at the Southern New Mexico
17 Correctional Facility?

18 A. Yes, I was.

19 Q. In that capacity, I take it you weren't an
20 investigating officer with the STIU, or --

21 A. No, I wasn't.

22 Q. -- or for the warden, for that matter?

23 A. No.

24 Q. But in that capacity sometimes would you
25 overhear information that you would pass on to those

1 that might be investigating crimes?

2 A. Yes.

3 Q. Specifically, I want to bring your
4 attention to March 7, 2001. Prior to coming in here
5 today, did you get to take a look at a document that
6 had that date on it?

7 A. The first subpoena did have it. And when I
8 was told that my testimony wasn't needed, I went
9 ahead and got rid of it.

10 Q. Okay. I'm going to show you what has been
11 admitted as Exhibit, L and have you take a look at
12 that and see if, in fact, that's the document you
13 might have reviewed when you first received your
14 subpoena? Is that the document?

15 A. That is correct.

16 Q. What is Defendants' Exhibit L?

17 A. It is a memorandum that -- usually, when
18 individuals come in, they always talk or say
19 something. So it's not my job to decide whether the
20 information is true or not. So what I do is I just
21 type it down and pass it on.

22 Q. In case it might be important?

23 A. Correct.

24 Q. Would you have done this report on March 7,
25 2001?

1 A. The date shows March 7, 2001, yes, sir.

2 Q. Okay. Would you have done it even that day
3 or the day after?

4 A. I can't recall exactly.

5 Q. Okay. What was your practice at that point
6 in time? If someone said something that was
7 concerning, would you try to write it down on that
8 shift or the next time you --

9 A. Yes, I would try.

10 Q. So if it was the end of your shift, you
11 might do it the next day, or something?

12 A. Correct.

13 Q. Do you recall this information that's put
14 down in this report?

15 A. No, sir, I don't recall at all.

16 Q. When you do a report like Exhibit L, would
17 you try to put down as much information and as
18 accurate information as you could?

19 A. I put down information, and then I pass it
20 on. If it's pertinent to anything that they're
21 looking into, then they'll come up and ask me for any
22 added information.

23 Q. You certainly wouldn't put anything that
24 was inaccurate in those reports, right?

25 A. Oh, no, no.

1 Q. Did you know an inmate by the name of
2 Leonard Lujan?

3 A. Right now I don't even know who he is.

4 Q. Okay. The names -- there are probably a
5 ton of inmates that came by --

6 A. Quite a bit, yes, sir.

7 Q. -- during your years. Did you remember an
8 inmate by the name of Jimmie Gordon?

9 A. Not right offhand, no.

10 Q. So this says you received confidential
11 information. What did you mean by "confidential
12 information"?

13 A. The confidential information is what's
14 written right there; that I would consider
15 confidential.

16 Q. Okay. Well, the beginning of this report
17 says, "The informant who has provided information,
18 which has been accurate in the past," and then it
19 goes on to state what that person said. Do you see
20 that?

21 A. Yes.

22 Q. So would this have been a person who you
23 had gotten in the information in the past and passed
24 on to the warden previously?

25 A. Pretty much. Probably information that in

1 the past had been proved to be accurate.

2 Q. Have you ever been in law enforcement other
3 than your role here?

4 A. In Corrections? I've been in Corrections?

5 Q. Yes.

6 A. No, sir.

7 Q. How about in Corrections, were you -- did
8 you ever -- were you ever in any investigative role?

9 A. In '99 to 2001, I didn't do any
10 investigations, but drugs were presented to me to
11 follow through and present into the district
12 attorney's office for prosecution.

13 Q. And so this language here, "provided
14 information -- "the informant who has provided
15 information, which has been accurate in the past,"
16 that's language that we often see in the courthouses
17 as affidavits for search warrants and things like
18 that. Where did you get that language from?

19 A. When -- probably -- I would say probably
20 through our training that we get refresher courses
21 through the years in Corrections.

22 Q. Okay. So when you do a report, you want to
23 let the people that read it know that this isn't just
24 somebody who is giving you some random information,
25 it's somebody who you've relied upon previously; is

1 that fair?

2 A. Correct. Well, it's based on any
3 individual giving information. And then it's passed
4 on. But we were always taught never to put who the
5 person was giving the information, in case the memo
6 would get lost, or --

7 Q. Fair enough. But when you put down this
8 informant had provided accurate information in the
9 past, was that so that your superiors would know that
10 this is something that might be reliable?

11 A. That would probably be their decision, if
12 there is anything pertinent that would coincide with
13 what information they have on any individual.

14 Q. Why would you tell the warden here that the
15 informant that provided information on this instance
16 had been accurate in the past? Why did you tell the
17 warden that?

18 A. Probably more than likely the individual
19 had given me information in the past.

20 Q. Okay. That was accurate?

21 A. Correct.

22 Q. Would you have recorded the name of that
23 informant in some other form somewhere else?

24 A. Not that I can recall.

25 Q. If STIU had come and talked to you, and

1 asked you who that informant was, or the warden did,
2 would you have told them?

3 A. More than likely.

4 Q. Would you ever have withheld the name of
5 that informant from your boss, the Warden?

6 A. No, sir.

7 Q. I know this is probably an impossible
8 question to ask, but lawyers are fond of asking
9 impossible questions, so I'm going to ask you anyway,
10 okay? Could you tell us how long you would have
11 remembered the name of that informant after 2001? Is
12 that something -- you know your own memory -- is that
13 something you would have forgotten the next day, a
14 month, a year, a couple years?

15 A. Probably after I was removed from the work
16 detail supervisor.

17 Q. Which would have been when?

18 A. I don't know exactly when. And I don't
19 know if I was placed at prison industries after that.

20 Q. Could you give us maybe a year?

21 A. Probably 2002, 2003, somewhere around
22 there. All supervisors are subject to rotations of
23 shifts.

24 Q. And just go a little bit further down. In
25 this report you say, "If it is possible to pass this

1 information to the facility that inmate Gordon was
2 sent to, in case this hit is true." Do you see that
3 sentence there?

4 A. Yes, sir.

5 Q. Did you write that because you were
6 concerned for inmate Gordon's safety?

7 A. I may have, yes, sir.

8 Q. Is that what it appears to state?

9 A. That is correct.

10 MR. CASTLE: If I could have a moment?

11 THE COURT: Certainly.

12 MR. CASTLE: No further questions.

13 THE COURT: Thank you, Mr. Castle. Anyone
14 else? Mr. Burke? Anybody?

15 MR. BURKE: No, Your Honor.

16 THE COURT: Any other defendant have any
17 questions of Mr. Barela?

18 Mr. Beck, Mr. Castellano, do you have any
19 in cross of Mr. Barela?

20 MR. CASTELLANO: Yes, Your Honor.

21 THE COURT: Mr. Castellano.

22 CROSS-EXAMINATION

23 BY MR. CASTELLANO:

24 Q. Good afternoon, Mr. Barela.

25 A. Good afternoon.

1 Q. You said you used to present cases to the
2 DA's office for prosecution; is that correct?

3 A. That is correct.

4 Q. Did you ever present any cases to me for
5 prosecution back then?

6 A. Mainly all of them.

7 Q. So can we have Exhibit L back up here,
8 please. And while we're doing that, how often would
9 you write reports like this?

10 A. During the work detail, probably three or
11 four times, somewhere around there.

12 Q. Three or four times during what time
13 period? Per week? Per month? During your entire
14 term there? Do you remember?

15 A. It's hard to say. I can't even recall how
16 many I've written, if I wrote any, or if that was the
17 only one.

18 Q. And did you know whether or not either of
19 these people were affiliated with the SNM Prison
20 Gang?

21 A. Not a clue.

22 Q. Were you familiar with the SNM Prison Gang
23 from your time at the prison?

24 A. Yes, I was.

25 Q. And how would you describe them as a gang?

1 A. Like individuals sticking together. That's
2 about all I can say about that.

3 Q. Would you consider them a violent or
4 dangerous gang?

5 A. Yes, I would.

6 Q. Looking at the document, can you tell the
7 Court whether this document was prepared in order to
8 prosecute anybody, or was it for the safety of people
9 at the facilities?

10 A. Probably -- well, I don't know what they
11 used it for. It looks like it was placed in some
12 kind of file.

13 Q. So if it was addressed to the acting chief
14 of security, would that be important for the security
15 of the institution?

16 A. Yes.

17 Q. And as far as you knew, was there any crime
18 committed, or were you trying to possibly prevent a
19 crime, if this information was true?

20 A. I would say to prevent.

21 Q. So under these circumstances, were you
22 investigating any type of crime?

23 A. No, I was not.

24 Q. And is it accurate to say that you just
25 received information and forwarded it to somebody

1 else?

2 A. That is correct.

3 Q. And that way, at least if inmate Gordon was
4 in harm's way in some way, he could potentially be
5 protected?

6 A. Correct.

7 Q. Now, in terms of the information being
8 reliable, did you or the institution have a standard
9 for determining whether somebody was considered
10 reliable?

11 A. I believe the facility had their standard
12 of reliable informants.

13 Q. So when you indicated that the person or
14 the information provided before was reliable, were
15 you using the institution standard, or was that just
16 your own personal standard?

17 A. No, that would be the institution standard;
18 that would tell them, you know, to at least look into
19 it, or probably find the individual.

20 Q. Isn't it a case that if more information is
21 necessary, you could be contacted. Do you recall
22 anybody ever following through with you regarding
23 this information?

24 A. I don't recall if they did or not.

25 Q. Then, as I stated here -- I'll highlight

1 for you -- where it says, "The information as
2 provided has been accurate in the past." Do you
3 remember how many times somebody would have to give
4 you information in order for you to put that in a
5 report, for reliability purposes?

6 A. I believe once -- well, once I would submit
7 it, if it was found to be true, then that would be
8 probably, or has given information in the past, more
9 than likely.

10 Q. And so since you don't remember either of
11 these individuals, is it fair to say you don't know
12 whether if they were even associated with the SNM
13 Prison Gang?

14 A. That's correct. I wouldn't know if they
15 were.

16 Q. And it looks -- at least from the memo you
17 wrote, there is an indication that Jimmie Gordon was
18 being moved, and so this information was supposed to
19 follow him wherever he was to keep him safe; is that
20 a fair conclusion?

21 A. Yes, sir, that's correct.

22 Q. Once again, since this is directed to the
23 active chief of security, was this in any way
24 prepared for purposes of litigation or for court
25 purposes?

1 A. I wouldn't know exactly what it was going
2 to be used for.

3 Q. All you knew was you had information, and
4 it was your job to make sure you passed it on so
5 someone could be kept safe?

6 A. Correct.

7 MR. CASTELLANO: May I have a moment, Your
8 Honor?

9 THE COURT: You may.

10 MR. CASTELLANO: Thank you, I pass the
11 witness.

12 THE COURT: Thank you, Mr. Castellano.
13 Mr. Cooper or Mr. Castle.

14 MR. CASTLE: Just one question.

15 REDIRECT EXAMINATION

16 BY MR. CASTLE:

17 Q. If you can look at Defendant's Exhibit L.
18 Just to clarify, was this addressed to the acting
19 chief of security, or was this to Lawrence Tafoya,
20 the Warden?

21 A. The acting chief of security was my
22 supervisor. So any memos that I would submit -- I
23 can't go directly to the warden; they have to go
24 through my immediate supervisor.

25 Q. So it went through him, but to the warden,

1 right?

2 A. Yes, sir, that's correct.

3 THE COURT: Anyone else? All right. Mr.
4 Barela, you may step down. Is there any reason Mr.
5 Barela cannot be excused from the proceedings? Mr.
6 Castle?

7 MR. CASTLE: No, Your Honor.

8 THE COURT: Anyone else have any objection?
9 Mr. Castellano, can he be excused?

10 MR. CASTELLANO: Yes, sir.

11 THE COURT: All right. Mr. Barela, you may
12 be excused from the proceedings. Thank you for your
13 testimony.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: All right. Do we have further
16 witnesses we want to take this afternoon, Mr. Castle?

17 MR. CASTLE: We have no other witnesses
18 this afternoon.

19 THE COURT: All right. Do you want to --
20 let me ask, does the Government have any witnesses on
21 the motion to dismiss?

22 MR. BECK: No, Your Honor.

23 THE COURT: All right. Are we ready to
24 argue the motion to dismiss? Or do we have more
25 testimony we need to take? I know we've got the one

1 other 104 tomorrow. We've got Mr. Acee, don't we?

2 MR. CASTLE: We have Mr. Acee and also
3 Special Agent Roundy.

4 THE COURT: Okay. Is that tomorrow?

5 MR. CASTLE: Yes.

6 THE COURT: Did we work out the details on
7 Mr. Acee, how he's going to testify?

8 MR. BECK: I think he's preparing to
9 testify by phone. And I think Mr. Castle will get
10 him the documents, or I will from Mr. Castle.

11 THE COURT: Is that acceptable, Mr. Castle?

12 MR. CASTLE: Yes, Your Honor.

13 THE COURT: Are all the defendants
14 comfortable with that? Mr. Burke?

15 MR. BURKE: Yes, Your Honor.

16 THE COURT: All right. We'll take his
17 testimony by phone tomorrow, we'll take Mr. Roundy,
18 then we'll argue the motion to dismiss after we take
19 that testimony? Is that the plan?

20 MR. BURKE: Yes, Your Honor.

21 THE COURT: All right. Then we may have
22 skipped around a bit, so y'all may have to get me
23 back on-track as to where we are.

24 MR. CASTLE: If I could help the Court.

25 THE COURT: Yes, you may.

1 MR. CASTLE: We skipped over, but I think
2 they argued it somewhat, but there was Document -- I
3 think it's 9 on your tab, Document 1871.

4 THE COURT: Yes, that's what I had next,
5 because Mr. Troup's motion is being oral argued at
6 the same time with Mr. Garcia's, right, on the motion
7 to dismiss? Those are all being argued together?

8 MR. BURKE: Correct, Your Honor.

9 THE COURT: All right.

10 MR. CASTLE: Judge, we actually might have
11 skipped over number 8, which is the United States'
12 motion in limine to exclude extrinsic evidence.

13 THE COURT: I'm not sure I brought that
14 back with me. Do you want to argue that? Are you
15 going to refresh -- I read it in preparing for the
16 last hearing, but I didn't reread it and didn't bring
17 it with me.

18 THE CLERK: Do you want me to reprint it?

19 THE COURT: Let's see what the motion is.
20 Maybe they can jog my memory.

21 MR. BECK: Yeah, I think the argument can
22 be pretty quick. This is our motion to exclude the
23 videos of our testifying witnesses who participated
24 in contact visits. So the Court has previously
25 overruled this objection in Trial 1. I think we were

1 trying to get a second bite at the apple.

2 THE COURT: Are you going to have a bunch
3 of them again this time?

4 MR. BECK: I don't expect we'll have as
5 many this time. I think I'd anticipate that it would
6 be Benjamin Clark, Billy Cordova again, whose videos
7 we saw from the last trial. And I think that may be
8 it.

9 THE COURT: And the defendants want to show
10 these to the jury? Is that --

11 MR. BURKE: Yes, Your Honor.

12 THE COURT: Well, I guess my reasoning has
13 been that, just as I have under Old Chief allowed the
14 Government to put on their case, and the robustness
15 with which I think the Supreme Court has indicated it
16 should be allowed, the defendants can do the same.
17 It seems to me that the evidence is admissible. I
18 think, if I understand the Government's point is,
19 once the witness agrees that he had sex with family
20 members, girlfriends, wives, that it's not necessary
21 to show the tape, and it's a 403 argument. And I
22 don't know how much the jury enjoys it, but -- so
23 it's a call that I probably will leave to the
24 defendants. But, in fairness to them, allowing them
25 to put on their case with the same robustness that

1 I'm allowing the Government, it doesn't seem to me
2 that I should be kind of stipulating away their
3 ability to put it in. It's relevant. And because it
4 goes to benefits that the cooperators may be getting
5 in these cases, prison officials or the Government is
6 turning an eye and letting this take place. I
7 thought about it several times, but I guess I'm
8 inclined to continue to allow those.

9 Anything else you want to say in support of
10 your motion, Mr. Beck?

11 MR. BECK: No, Your Honor. I think we just
12 tried to beef it up a little. I think last time it
13 was mostly oral. And this time we wanted to put it
14 in writing to see if we could get a hit, or maybe a
15 bunt over to first base.

16 THE COURT: Let me see if Mr. Burke talks
17 me out of it.

18 MR. BURKE: Oh, no, I'm not going up there.
19 I think you were right the first time, and you're
20 right this time.

21 THE COURT: Let me ask y'all, I know some
22 of you have talked to jurors and stuff the first
23 trial. Did you get any feedback as to whether they
24 liked that stuff? Didn't like it? Any reaction?

25 MS. ARMIJO: Your Honor, as I recall, the

1 jurors were very vocal about it, and they disliked
2 it, and actually thought that it was not needed, and
3 were very vocal about how they did not want to see
4 it, and how it was not needed, and almost -- I think
5 the tone was that they held it against the defense.
6 So if they want to put it on, by all means, go ahead.

7 THE COURT: Well, anybody want to speak?
8 Mr. Burke, did you want to speak on the issue?

9 MR. BURKE: No. Your Honor, I think that
10 we'll decide amongst ourselves.

11 THE COURT: Anybody else want to speak on
12 it? Well, I think I'm going to leave it to the
13 defense. If you want to put it on, you can put it
14 on. It may be stretching robustness to some limits
15 there, but I'll deny the motion to keep it out, and
16 allow the defendants to decide whether they want to
17 put it in.

18 All right. The next motion that I have up
19 was 1871, which I think we may have resolved. But it
20 may have been more with the first trial defendants
21 than with the second. I didn't -- I know when this
22 issue came up about Agent Acee's -- some of the
23 activities up in Vancouver -- when it came up, I
24 didn't think anything there was relevant. The
25 defendants in the first trial didn't attempt to do

1 anything with it. Anybody plan to do anything with
2 it on the second trial? Is this motion basically
3 opposed to keep out unrelated conduct? Anybody want
4 to speak to it? Mr. Benjamin.

5 MR. BENJAMIN: I would assume if they open
6 the door, or something like that -- I didn't
7 necessarily agree with the statement that there
8 was --

9 THE COURT: I'm doing okay. If Ms. Bean is
10 hearing you, I'm all right.

11 MR. BENJAMIN: There was -- I think it was
12 in their motion that they stated that they didn't see
13 any actions on the part of Agent Acee or something.
14 I disagree with what was in the motion. But I don't
15 see how I could get it in, is probably the fair
16 statement.

17 THE COURT: Okay.

18 MR. BENJAMIN: But if I do, I will
19 approach.

20 THE COURT: Okay. All right. Does
21 everybody agree with that? Right at the moment,
22 we're not going to? Mr. Burke?

23 MR. BURKE: Yes, Your Honor, I agree.

24 THE COURT: Okay. At the present time,
25 we'll not go into unrelated conduct that's brought up

1 in the motion. If somebody sees the Government has
2 opened the door, then before they'll try to get into
3 it with Mr. Acee in front of the jury, then they'll
4 approach the bench. Does that take care of your
5 motion, Mr. Beck?

6 MR. BECK: Yes, Your Honor.

7 THE COURT: All right. Then we'll go to
8 32. I have been putting behind Tab 32 is everything
9 that's been rolling in on the James statements. So I
10 have been reading them, and I am working on it. I
11 would say that I'm right at the halfway point on my
12 chart. I have continued to work on this case
13 throughout the three weeks that I could -- as much as
14 I could to try to close out some stuff in
15 Albuquerque. And the only reason the charts are not
16 completed, is because I've been looking at some other
17 issues related to the evidentiary issues. And I'll
18 try to be sharing those with you over the next day
19 and a half, so that before you leave here, I hope to
20 have -- I would love to have every chart handed to
21 you. I don't know if that's going to be possible.
22 But I hope to have charts handed to you. They may be
23 rough. And I still may be working on them as we
24 start the trial. But I'll try to hand you something
25 physically, so that you know what I'm thinking on all

1 the James statements, on all the statements against
2 interest, and then also some of the new statements
3 that have come up here in the last round of briefing
4 that we may be arguing a little bit later. I've
5 given some thought to those.

6 So does anybody have anything else on what
7 I'm calling the James statements, this bundle of
8 additional briefing that's been coming in?

9 MR. CASTLE: We have witnesses tomorrow.
10 That's it.

11 THE COURT: Okay. And those relate to the
12 statements against interest, not any more James
13 statements; correct?

14 MR. CASTLE: That's true. And I told Mr.
15 Castellano I'd consult with him and let him know the
16 gist of it.

17 THE COURT: And you've got two more of
18 those you're raising issues with, Mr. Castle?

19 MR. CASTLE: Actually three, Judge. Josh
20 Mirka, Joseph Otero, and Leroy Lucero.

21 THE COURT: Okay. Unless somebody has
22 something on that bundle of briefing that I hope to
23 hand you something sooner rather than later, we'll
24 come back to that.

25 The next motion I had up was, I think, a

1 motion that's now moot, or I denied it at the last
2 hearing. And this was Mr. Sapien's motion to quash
3 the subpoena as to Fred Quintana. So unless anybody
4 has anything, I think I'm just denying that motion,
5 because I think I effectively did that last time when
6 we had the hearing.

7 And then I understand the next motion is
8 1936, which was the motion that was an objection to
9 proposed courtroom seating arrangement. I understood
10 that Ms. Wild had some conversations, negotiations
11 with Mr. Castle, and the current arrangement was come
12 up with. Let me sort of see if I can put it on the
13 record.

14 To try to assist the jury in doing their
15 duty, which they will be advised throughout the trial
16 to do, is to treat each defendant individually. I
17 think this was Mr. Castle's suggestion, or Ms. Wild,
18 but it came out of that, was we would color code the
19 tables. So the Government got bunting on their table
20 as well. But the defendants have different colors.
21 And think the colors were white and black. I think
22 there might have been some hope that there could be
23 more colors, but I think this was all we could come
24 up with. We've looked at them; we looked at them in
25 the first trial, we've looked at them today.

1 Mr. Roberts, did that screen ever come on for you
2 this morning? Did it ever come on?

3 MR. ROBERTS: Yes, I believe it did.

4 THE COURT: It did. Okay. And did it
5 create any problems from your standpoint?

6 MR. ROBERTS: No, I don't believe so,
7 Judge.

8 THE COURT: All right. Now, the good thing
9 that we got that I did not expect to give you was
10 everybody has got a microphone. And IT went to great
11 efforts to just scrounge around and find all this --
12 monitor for each one of you. And I don't know where
13 they found the portals. But if you see those guys,
14 thank them, because that was really more than I
15 thought we were going to be able to deliver.

16 So, in any case, I understand that this
17 objection has been withdrawn, Mr. Castle?

18 MR. CASTLE: Yes, Your Honor. I filed
19 1936. My main objections were two-fold; one, that we
20 couldn't sit with our clients; number two, the
21 separation of the two rows. Because the Court made
22 the efforts to take care of those two concerns, I
23 filed last night motion 2053 to withdraw my
24 objections under 1936.

25 THE COURT: And the one other thing I think

1 we were able to do is, I think you'll be able to
2 have -- and I see it today -- you'll have paralegals
3 that will be able to stay here. And Ms. Gilbert will
4 be able to stay here. And as soon as we get through
5 with jury selection, I think you can have that inside
6 of the well there. So I think you'll be able to get
7 some people in here. And so I didn't know if we were
8 going to be able to do that, too. So I'm pleased
9 that at least we made some progress on that.

10 MR. CASTLE: Your Honor, the other thing --
11 this isn't really part of that motion -- but some of
12 the defendants have paralegals that can't sit up
13 here. Are we going to be free to be able to move or
14 have to ask the Court's permission?

15 THE COURT: No, you don't need to ask my
16 permission. The one thing you might ask is, you
17 might ask the marshals if they have any concern. But
18 they've been pretty good to the lawyers. I think if
19 the defendants get up and move, we might have a
20 problem. But I think they've been pretty good about
21 the lawyers. But you might just ask Deputy
22 Mickendrow, when he's in here, if there's any problem
23 on that. But from my standpoint, no problem all.

24 All right. If there is nothing else on
25 that, we then will move to the motion to bifurcate

1 Counts 4 and 5 from Counts 1 and 3 and 13 through 16.
2 And as I understand it, this is a motion that
3 Mr. Garcia has filed. It's not unanimous among the
4 defendants. I think -- do both the Gallegos brothers
5 oppose this one? Okay. I knew that Ms. Torracco and
6 Mr. Roberts' client did. I've certainly thought
7 about it. I went and looked at all the pictures that
8 anybody had given me. I -- you know, look, they're
9 not pictures that anybody would like to have. I
10 guess, having just gone through this trial, after
11 hearing all the evidence, I don't think that they're
12 any more inflammatory or a problem than what I think
13 we're going to hear, is almost daily, the witness of
14 the day testifying about two or three murders, and
15 talking about how they were accomplished, whether
16 they were accomplished by some strangulation or by
17 repeated stabbings, or by shots, or I know there are
18 other burned bodies in the 302s, that I've read
19 about. I just don't think that it should drive what
20 we're trying to do here. I think it would
21 probably -- especially given the Gallegos brothers'
22 objections, given the Government's objections, the
23 fact that the Government would have to order theirs
24 in a certain way, the fact that the jury would have
25 to deliberate twice -- I just don't think those

1 pictures rise to the level of causing anything of
2 that nature to do. I'll certainly listen. I know
3 that we talked about it some at the end of the
4 hearing, and it was one of the things that y'all
5 asked me to do, that if I did not schedule these
6 hearings, to concentrate on, so it was something that
7 I spent some time looking at, and grabbing the
8 pictures from a number of exhibits, and looking at
9 them in different ways.

10 But in any case, Mr. Benjamin, do you want
11 to argue this motion? Do you want --

12 MR. BENJAMIN: At this point in time, Your
13 Honor, I was just going to clarify that Joe Gallegos
14 is asking for Counts 4 and 5 to be severed. But we
15 join the bifurcation. I want out of the main group
16 with the Burns murder.

17 THE COURT: Yeah, fair enough. And I think
18 that was also Andrew Gallegos' position as well;
19 correct? Looks like you're nodding affirmatively.

20 MS. TORRACO: Yes.

21 THE COURT: All right. Mr. Castle, if you
22 want to argue the motion.

23 MR. CASTLE: Your Honor, I argued it to
24 some extent last time.

25 THE COURT: Right.

1 MR. CASTLE: And I set forth what I
2 considered my best arguments in the pleading. So
3 I'll give you my worst ones probably now. It seems
4 to me that the weight here is between prejudice --
5 and I think there is some belief that there is going
6 to be a danger of prejudice; the question is whether
7 it's undue or too much, or whether the Court can cure
8 that prejudice, versus inconvenience. Because I
9 don't think the Government really, in their response,
10 really said anything other than this is just not the
11 way we'd like to do it. The jury would have to
12 deliberate twice. But that's just a matter of
13 convenience, and they're really going to have to
14 deliberate on each of those counts likely separately
15 anyway. So I'm not sure it's going to save any time
16 in deliberations. But even if it did, I don't think
17 that should be the driving force.

18 The real question is, you know, is it fair?
19 Now, I think this Court had some concerns the last
20 time whether Counts 4 and 5 are even going to make it
21 past, you know, half time, essentially, because there
22 is a very tenuous relationship for federal
23 jurisdiction here. And I think Mr. Benjamin has
24 argued it better than I will. And if that happens,
25 and if they haven't established it, then we've just

1 had a trial where we've taken at least a week, if not
2 more spreading all these gory pictures, and all these
3 horrible crime base information with -- spreading it
4 around with a brush that's going to be tainting all
5 of our clients. Because it's not going to be
6 limited.

7 And my understanding is the Government is
8 offering not only against these individuals
9 themselves, but also as enterprise evidence. So how
10 do we unring that bell? If we go back -- if the
11 Court doesn't find jurisdiction, or that there has
12 been enough evidence of that, do we then say we know
13 we admitted all this as enterprise evidence, but now
14 jury, you're going to have to, after the fact, kind
15 of undo all that?

16 I guess the other alternative is don't --
17 give an instruction and say this is not enterprise
18 evidence against the other defendants. And so it's
19 not admissible; you shouldn't consider it whatsoever
20 against these other defendants. I'm not sure which
21 way the Government is going. But I thought they were
22 saying all this evidence is also enterprise evidence.

23 So I think we all have, I guess, a dog in
24 this hunt with regards to federal jurisdiction.

25 Because if there is no federal jurisdiction on 4 and

1 5, then it shouldn't be admissible against any of our
2 clients.

3 With that said, I understand that I've lost
4 this motion, so I think I made my record.

5 THE COURT: All right. Thank you, Mr.
6 Castle.

7 Anyone else? Ms. Torracco, do you want to
8 speak on this?

9 MS. TORRACO: Yes, please. And I
10 understand, Your Honor, that you have already ruled.
11 But I would just like to briefly say a couple of
12 things. If you were to sever Counts 4 and 5, and
13 everyone else in this room has heard you loud and
14 clear that that's not what you want to do, but if you
15 were, it solves the problem of what's happening with
16 Mr. Billy Blackburn and Scott Davidson and the issues
17 that they will then be reset, and you could do Counts
18 4 and 5 first. Counts 4 and 5 will be significantly
19 a shorter trial than the entire trials together or
20 even just with the remaining five defendants, so it
21 would be with the remaining four defendants. So I
22 just want to throw that out there.

23 The second thing is that, when I argued my
24 severance motion, one of the questions that the Court
25 had for the Government was: Is Andrew Gallegos a

1 validated SNM member? Because there were some
2 concerns that I had raised that he's not a validated
3 SNM member, and there isn't any evidence to show that
4 he is. And at that point, it was represented by the
5 Government that he is a validated SNM member. I've
6 looked through all the discovery. The documents that
7 we have from the Department of Corrections and Bureau
8 of Prisons do not say that he is a validated SNM
9 member.

10 I did email Ms. Armijo, who was kind enough
11 to get back to me, and I told her, where is all this
12 evidence that you were talking about? And I wasn't
13 playing dumb. I really can't find it. Where is all
14 this evidence? She did direct me to a document that,
15 again, does not say what the Government represented
16 to the Court. Because I remember that was one of
17 your concerns.

18 And then, finally, one of the other
19 concerns when I argued severance, was that this Court
20 was saying: Okay, Ms. Torraco, if we sever Counts 4
21 and 5, then we still have to hear all that same
22 evidence about SNM is a prison gang, and they started
23 in the 1980s, and they gained power, and they're
24 violent, and this is how they give orders and da, da,
25 da.

1 Well, Counts 4 and 5 happened outside
2 prison, when both Gallegos brothers were not inside
3 the pen. And as far as I can tell there is no
4 orders, there is no paperwork. The Government's
5 theory, the best that I can tell, Your Honor, is that
6 since they're validated SNM members, and there is
7 going to be all this evidence that they're SNM
8 members -- which there is not -- therefore, anything
9 they do -- it's like your mayor argument: Well,
10 because they're SNM, and therefore, they supposedly
11 did this, which I assert there is insufficient
12 evidence that either Joe Gallegos or Andrew Gallegos
13 committed this murder, or participated in any way.
14 But nonetheless, for argument's sake, since they did
15 it, and since they're SNM members, therefore, it was
16 advancing the enterprise, kind of like your mayor
17 argument. So therefore, you don't need, and the
18 Government doesn't need all this testimony about what
19 happens in jail and how the prison orders go down,
20 because this was something that happened outside.

21 So I know you've made your ruling. I want
22 to keep planting the seed, because I do believe that
23 justice dictates having these two counts heard
24 separately. We could go first. It would resolve the
25 problems with Arturo Garcia's attorneys. And it's

1 not going to be anywhere near the magnitude of trial
2 that it would be if we sit here. We wouldn't even be
3 here anywhere close to eight weeks. So thank you for
4 hearing me.

5 THE COURT: Well, you're not arguing for
6 Mr. Castle's motion. You're going back to your
7 motion to sever; correct?

8 MS. TORRACO: Right. Because our position
9 on Mr. Castle's motion is that the correct decision
10 is to sever.

11 You know, the other thing -- and, you know,
12 I'm wondering how many people are going to get mad at
13 me in this room after I propose this, but maybe it
14 does need to be two juries. And then that's the
15 bifurcation is the two juries; they can hear the
16 enterprise evidence, and then we move on to Counts 4
17 and 5. The other jury takes a recess. I don't know
18 that Counts 4 and 5 is going to take that long.

19 THE COURT: Tell me, if you're toying with
20 that idea, why do you not like Mr. Castle's proposal
21 of bifurcation?

22 MS. TORRACO: I don't see what it achieves.
23 So he -- and please, by all means correct me if I'm
24 wrong or come to the podium, but -- I'm sorry, Your
25 Honor.

1 THE COURT: Well, it doesn't necessarily
2 help you any.

3 MS. TORRACO: No, not at all.

4 THE COURT: How does it hurt you? What is
5 it that you don't like about bifurcation?

6 MS. TORRACO: I guess it doesn't do
7 anything for us. I suppose you're right, we could
8 remain silent on it instead of opposing.

9 THE COURT: So it's more that you feel like
10 it somewhat undercuts your motion to sever argument?

11 MS. TORRACO: That could be one way of
12 saying it. But I think you're right, in that it does
13 nothing for us. So there is no reason -- there is no
14 benefit to us. You're right. It's interesting that
15 no one wants to be on the Adrian Burns murder case on
16 those particular counts. It does nothing for us, but
17 it doesn't solve our problem that we believe we're
18 prejudiced by the remaining counts.

19 And I just want to check with co-counsel if
20 there is anything to add. I have the strong, silent
21 type over here.

22 THE COURT: You just don't want to be in
23 the case with the other three conspiracies?

24 MS. TORRACO: Well -- and I don't think
25 that Counts 4 and 5 are really relevant to the other

1 counts. There is the issue on the Gomez counts.
2 Other than that, everything else happens inside the
3 penitentiary.

4 So here -- we're sitting here to hear about
5 all these penitentiary murders. And imagine if
6 you're on the jury, and you're hearing about this --

7 THE COURT: But isn't about half the case
8 outside of the prison, about half in?

9 MS. TORRACO: I don't think that's --

10 THE COURT: Gomez and Burns?

11 MS. TORRACO: No. I'm sorry.

12 THE COURT: Gomez and Burns.

13 MS. TORRACO: Gomez and Burns.

14 THE COURT: So there are three conspiracies
15 there, and then you've got two in the prison?

16 MS. TORRACO: If you want to take Gomez and
17 Burns, that's better. But I was sitting there
18 thinking about this the other day. The jury is going
19 to sit there -- as a matter of fact, let me just back
20 up. My very best friend called me the other day and
21 thanked me for being a lawyer on this case because
22 she just got out of jury duty. She got a letter,
23 because she listed -- it said: Do you know any
24 attorneys? And she listed my name, and she thinks
25 that's what got her out of it. And she said the

1 thing that was the most -- when I was talking to her,
2 is that she thought it was kind of okay because --
3 she was really scared, but she said that at least
4 it's a prison gang, and everything happens in prison.
5 And I'm like, Well, the gentleman that I'm defending
6 is accused of doing something outside prison. And it
7 scared her to think that the prison gang, and you're
8 going to hear all these awful things that happened in
9 prison, actually reaches outside the prison. That's
10 going to scare a jury. And that invokes an emotional
11 response to, Oh, my gosh, now I'm in danger.

12 THE COURT: But how is that going to change
13 if we just tried, say, the Gallegos brothers together
14 with their counts on the Burns counts? How is that
15 going to change? The Government is going to sit over
16 there and explain it's a prison gang; they're going
17 to explain that there is going to be a bunch of these
18 witnesses again talking about what the gang does, and
19 the violence that it has to promote, how is that
20 going to change?

21 MS. TORRACO: Because they're not going to
22 hear -- I would hope they're not going to hear some
23 of the very horrific details of murders that have
24 occurred in the penitentiary. They don't go into the
25 same detail, and we don't get all those photos.

1 THE COURT: So it's the detail that is a
2 concern to you?

3 MS. TORRACO: Yes, I think so.

4 THE COURT: Because, if I understand what
5 the Government is going to do, they're going to put
6 on violence to show this is what the gang does,
7 drugs -- they're going to put those on, whether they
8 try one of you or seven of you.

9 MS. TORRACO: Right. But then they're
10 going to have to tie what happens inside to what
11 happened in Burns. We don't think they're going to
12 make that threshold.

13 THE COURT: But that issue is whether we
14 have it in just a trial with the Gallegos brothers or
15 in this one, they've still got that problem, right?

16 MS. TORRACO: Right.

17 THE COURT: That's just a problem with
18 their case.

19 MS. TORRACO: Right. And Mr. Castle and
20 Mr. Benjamin's points are well taken, that there is a
21 huge jurisdictional issue here. And we might end
22 up --

23 THE COURT: Well, I've already ruled on the
24 jurisdictional. I don't think there is a
25 jurisdictional issue. And I thought I --

1 MS. TORRACO: You did. But you know what,
2 things might change at directed verdict.

3 THE COURT: Well, it's not going to be a
4 jurisdictional issue. It's a federal crime. So I'm
5 the only person that can try them. So we've got
6 jurisdiction here. They may have a problem of proof
7 that they can't prove an element of the crime. But
8 they've got to establish that this, you know, that
9 this is connected or it's advancing the defendants'
10 interests, enhancing their status in the
11 organization. And that's the only problem they're
12 trying to go on against the Gallegos brothers,
13 maintain or enhance. And if they don't prove that --
14 but I don't think it's a jurisdictional issue.

15 MS. TORRACO: Okay. And you did say that
16 before. I apologize.

17 But may I inquire through the Court how
18 long the Government thinks Counts 4 and 5 are going
19 to take? I mean, is that just a week case -- I meant
20 W-E-E-K; I already know it's W-E-A-K, but I'm
21 wondering how long is that particular trial going to
22 take?

23 THE COURT: Well, I'll ask them when they
24 get up.

25 MS. TORRACO: Because that seems to me -- I

1 mean, I understand the bifurcation issue. If we have
2 to go along with the bifurcation issue, of course, we
3 go along. I mean, that's for this Court to decide
4 the bigger things. But I just see it as an
5 opportunity to remind you -- which I know you've been
6 thinking about it -- but I'm trying to be a zealous
7 advocate here -- that severance really is a
8 reasonable solution. It's a much shorter concise
9 trial. It's a cleaner trial. It solves the problem
10 of the issues that we've got with Arturo Garcia's
11 attorneys.

12 THE COURT: How does it solve that one?

13 MS. TORRACO: Because you would hear Counts
14 4 and 5 right away. We would start on Monday. And
15 they would be reset. And they could start after
16 Counts 4 and 5 -- the Count 4 and 5 trial closes.
17 And that --

18 THE COURT: The problem is I've got all the
19 Baca defendants saying they're not going to waive
20 their Speedy Trial Act rights anymore, and they want
21 to go on July 9. And the Government wants to try
22 this half of DeLeon. They didn't want me to
23 bifurcate the trial that I just did. And so I'm
24 running out of weeks here.

25 MS. TORRACO: I understand. So after we

1 find out how long the Government thinks the evidence
2 on Counts 4 and 5 take, let's say that the whole
3 trial, at the most -- I can't even begin to guess; I
4 would say two weeks. But let's just see what they
5 say. Then, after that, you're going to start the
6 remaining -- you would start the remaining
7 defendants. Well, they're still going to be done
8 before July 9, because we've estimated six to eight
9 weeks for this trial. It was eight for all seven of
10 us. We were going to be done in the middle of May to
11 the end of May. So you've got a whole four-week
12 buffer in there of June, which if we started Counts 4
13 and 5, that allows Mr. Blackburn and Mr. Davidson a
14 reprieve. There are conflict issues there that
15 they're going to have to sort out. It would give Mr.
16 Davidson time, which appears to be pretty critical,
17 with his issues.

18 THE COURT: And why you go first rather
19 than Mr. Castle going first?

20 MS. TORRACO: Well, I was thinking that, if
21 you sever, we go first because it allows Mr. Davidson
22 time with his wife, and to kind of solve that crisis.

23 The likelihood of any type of reversal on
24 appeal is certainly less with severance. What we're
25 really talking about is all that evidence, having to

1 go over and over and over the evidence that the
2 Government has on the enterprise. So at least that's
3 what I think that I heard, is that you're concerned
4 about, it's the same testimony on enterprise evidence
5 against Counts 4 and, 5 as it is against the rest of
6 the group. But I don't think that it is as complete.
7 I believe it's going to be shorter if you only tried
8 4 and 5 first on the enterprise evidence, and the SNM
9 Gang evidence and do Counts 4 and 5. Then start
10 over. And it's clean, it's safe. You know, and it's
11 kind of like Mr. Castle, he doesn't want to be with
12 my counts; I don't want to be with his counts. So
13 you actually are going to have a group of happy
14 criminal defense attorneys. And that makes for a
15 good courtroom, Your Honor. Anyway, I've taken up --
16 unless you have questions --

17 THE COURT: That means y'all won't object
18 for eight weeks?

19 MS. TORRACO: Well, if you try Counts 4 and
20 5 after my trial, I will be silent. Thank you.

21 THE COURT: Thank you, Ms. Torraco. Any
22 other defendants want to speak on this motion? It's
23 the motion to bifurcate.

24 All right. Mr. Castellano, are you going
25 to take this? I did notice in your motion -- or your

1 response to Mr. Castle's motion you mostly said,
2 Judge, you've already decided the motion to sever.
3 But I think Mr. Castle is raising another possibility
4 of bifurcation. What is the downside to it from the
5 Government's standpoint?

6 MR. CASTELLANO: Well, the downside is
7 trying to figure out really how to divvy up the
8 Government's case. And it really dictates how we
9 present our evidence.

10 THE COURT: Is that the biggest problem for
11 you?

12 MR. CASTELLANO: That's certainly a
13 problem. The other problem --

14 THE COURT: Tell me what the logistical
15 problems are. Is it getting witnesses here? And, I
16 guess, what is being envisioned -- and Mr. Castle can
17 correct me if I'm wrong, it relates somewhat to Ms.
18 Torracco's question -- let's say the last week of the
19 eight-week trial is the Burns -- alleged Burns
20 murder. It's hard for you put all those witnesses
21 into one week? Is that the logistical problem?

22 MR. CASTELLANO: It may be logistical
23 problems there, or recalling witnesses who we called
24 previously in the case to revisit the jury for
25 purposes of now talking about the Burns homicide,

1 because we have multiple witnesses who have
2 information about multiple defendants. And so what
3 we'll be doing is basically rotating the same
4 witnesses through the trial a number of times. So
5 it's inefficient in that way, which includes all the
6 transport problems and other problems.

7 But the other issue is the way the trial
8 looks. Because the jury, in a sense, will be fooled
9 into thinking that once they finish deliberating the
10 first time, they're done. And then it will be just
11 like on TV, we're going to say, well, wait, there is
12 more. And we're going to present more evidence to
13 them when they think they're going home. And so --

14 THE COURT: Well, I don't relish that
15 moment. But we have -- we did have that sort of
16 issue back between Booker and Blakely. You remember
17 where Judge Black and I would send the jury back in
18 for sentencing enhancements. And the jury would
19 think they were done and they would have to go back
20 in and then find weights, and was the gun in the
21 possession, you know, those things beyond a
22 reasonable doubt. They had to find those. So
23 between Blakely and Booker, we did that. It wasn't
24 the worst thing in the world. I always thought the
25 Supreme Court was a little bit untrusting of juries.

1 They did their job and they handled it. I didn't
2 think it worked as badly as it sounds in theory.

3 MR. CASTELLANO: I would consider that an
4 easy task compared to the jury deliberating on a
5 whole other set of evidence and witnesses and a
6 second set of deliberations. So I understand a
7 shorter deliberation on things related to the same
8 defendants, and largely the same evidence. But this
9 is going to be different evidence, potentially
10 different witnesses, some of the same witnesses. And
11 you and I had this discussion last trial about the
12 verdict form. And I initially wanted multiple
13 verdict forms. And you talked me out of the notion
14 of multiple verdict forms. And I actually ended up
15 agreeing with you that we should have one form of
16 verdict. And that's what the instructions refer to.
17 So in this case we're going to have multiple forms of
18 verdict to submit to the jury.

19 So even logistically it's just a strange
20 looking case. And it really interferes with our
21 ability to put on the case the way we want to put on
22 our case.

23 So it certainly interferes with the
24 prosecution's presentation of evidence, and order of
25 evidence. So I think that's another issue.

1 And then, like I said, for a jury who sat
2 through as many weeks of trial as they have, not
3 knowing that they have another deliberation after
4 this deliberation, I think potentially prejudices the
5 Government, because they're going to be fatigued;
6 thinking they're going home, and now we're going to
7 present more evidence to them. So there is certainly
8 the issue of prejudicing the Government, when they
9 just want to go home. And at that point, they're
10 just going to make a decision. And so I think that's
11 another issue on top of everything else. I know we
12 call this bifurcation. Really, it's a severance.

13 And the Court has specifically looked at
14 Counts 4 and 5 on at least two occasions, and held
15 that Counts 4 and 5 belong with the rest of the case.
16 And I believe that's the correct ruling.

17 The Court split this case up once already,
18 which meant you considered all of the evidence, all
19 of the counts, and divided the case the way you
20 thought was proper. And Counts 4 and 5 were part of
21 that. So, in essence, the Court has ruled on that.
22 And all this is is trying to cut it out. And what I
23 highlighted in my response was that even the defense
24 motion refers to Trial 1 and Trial 2. That's, in
25 essence, what this turns out to be.

1 So I think it unnecessarily complicates
2 things, and affects our ability to present our case.
3 And I think the Court, in essence, has considered
4 these counts.

5 THE COURT: To get an answer from Ms.
6 Torraco on her question, and I'll -- you know, the
7 defendants can correct me in rebuttal -- but it seems
8 to me they're just worried about that picture.
9 That's about the thing they've advanced the most.
10 The sort of things around the death of Mr. Burns
11 himself, how long do you think that that's going to
12 take? You're going to put a pathologist on?

13 MR. CASTELLANO: Yes.

14 THE COURT: You're probably going to
15 probably show the pictures. But the death itself,
16 that aspect that seems to be the biggest concern, how
17 long is that going to take?

18 MR. CASTELLANO: We're estimating just real
19 quick at the table, maybe five trial days. I can't
20 speak for the defense in terms of their
21 cross-examination. But it could take a week's worth
22 of trial on that whole set. There are a number of
23 witnesses related to the Burns homicide.

24 And I mean, these are murders, they're all
25 murders; we have four of them. I know Ms. Torraco

1 referred to the prison gang doing things in prison.
2 But the Court knows from Trial 1 we have at least
3 three cooperators who have at least two murders. And
4 for two of them one is in prison, and the other is on
5 the streets. So the Burns murder is not unique in
6 that way. And the jury is going to see pictures of
7 each of the victims in this case. None of them are
8 pretty. What we see in Burns is probably the
9 aftermath of his death. I think the report is going
10 to indicate that he was killed by the gunshot wound.
11 So luckily, I don't think the jury would have to
12 conclude he was burned to death. I think he was
13 basically burned to destroy evidence. So he was
14 killed by shooting; others were killed by
15 strangulation. All of those will be pictures the
16 jury is going to have to look at, including possibly
17 autopsy photos. And none of those are pretty. So I
18 don't see this as particularly more heinous than any
19 of the other murders. They're going to hear four
20 murders, and an attempted murder where someone is hit
21 over the head with a machete. That's not a pretty
22 picture.

23 So there is nothing pretty about this
24 evidence. And so I don't think it's unduly
25 prejudicial in that way. Like I say, they're going

1 to hear about four charged murders, plus probably six
2 other murders at least, by cooperators. So they're
3 going to hear plenty about it.

4 THE COURT: All right. Anything else on
5 this motion, Mr. Castellano?

6 MR. CASTELLANO: No, Your Honor.

7 THE COURT: Thank you, Mr. Castellano. Why
8 don't we do this: I don't want to cut anybody short
9 on this. Why don't we take about a 15-minute break,
10 and then we'll work till about 5:30. And so let's
11 try to get back in here in about 15 minutes.

12 All right. We'll be in recess for about 15
13 minutes.

14 (The Court stood in recess.)

15 THE COURT: Let's go back on the record. I
16 think all the defendants have an attorney. They're
17 trying on some suits. Looking good.

18 All right. I wasn't able to talk to
19 Ms. Wild during the prior break, but I did talk to
20 her this time. She says that all -- she's verified
21 this with jury services -- all that anybody received
22 in the first trial was a sequencing of who was going
23 to come into the courtroom. She cannot explain at
24 the present time why we had gaps in the seating
25 arrangement. But whatever seating arrangement --

1 this is what I understand, whatever seating
2 arrangement was created for the first trial was
3 created that morning. Something must have happened
4 to a few people on there. So you will receive -- not
5 today, because she can't get to it today -- but you
6 will receive in the morning, I think, the sequencing.
7 So you'll have -- that you'll create your own seating
8 charts from that, if you want, or you'll get one on
9 Monday morning. I think they're computer generated,
10 is my memory. So you'll receive one the same time I
11 receive mine.

12 And the reason I think it's computer
13 generated is because I don't think I had my law
14 clerks scrambling, like I have in Albuquerque, to
15 write them in. So I think you're getting the same
16 thing you got in the first trial, and I think you're
17 getting all I can really give you. So I'll keep you
18 posted on that.

19 Mr. Glazener will be here at 10:00. But
20 he's told Ms. Bevel he's not going to consent to any
21 waiver of conflict. So I think we're going to have
22 to start dealing with the reality of that. I think
23 it's almost a waste of time to get him here, if
24 that's case. Do y'all want me to call him, tell him
25 not to come, I can. If you want to let him come here

1 and see if anybody can deal with it? I'll just leave
2 well enough alone.

3 MR. BECK: I mean, if his client is not
4 going to consent, he's not going to consent. I think
5 that it's probably a good idea that he and his client
6 get in a room together. And if, at 10:00 tomorrow
7 morning here is as good a place as any, then I think
8 that may benefit him. But leave it up to him.

9 THE COURT: Okay. Because earlier in the
10 day he was saying he didn't know. Now he's saying he
11 will not consent. So I don't know if there were
12 conversations in between. But I don't have any
13 problem with him coming up, if you want to talk to
14 him.

15 MR. BLACKBURN: Do I get to talk to him, is
16 that what you're saying?

17 THE COURT: I'm not putting any
18 restrictions on you.

19 MS. ARMIJO: Your Honor, can we go back
20 real quick to the jury list.

21 THE COURT: Yeah.

22 MS. ARMIJO: So are we still going to get
23 who the 80 are, and the sequence, like Number 1 is
24 John Smith? We're just not going to get the seating
25 chart.

1 THE COURT: Yeah, you're not going to get a
2 seating chart, because they will not create the
3 seating chart until Monday morning when they know who
4 is here. Tomorrow you will receive the order. And
5 assuming that most citizens do their job, it will be
6 the seating chart. If you want to create one, you
7 can. But you'll have the sequencing. So you will
8 know who is going to be the 18 in the jury box.
9 You'll know who is going to be right behind Mr. Burke
10 back there and running that way. I don't have my
11 numbers. In Albuquerque I can tell you how many
12 people sit in each row. But I don't know this
13 courtroom well enough to do that. So you'll be able
14 to do that. And then on Monday morning we'll create
15 the seating chart, and it shouldn't have any gaps.
16 And the reason I think that's better is at this stage
17 of life, if they get too far back, I can't really see
18 them without making them stand up and things like
19 that. And I don't mind making them stand up, and
20 sometimes they have to.

21 Did you have something, Mr. Cooper?

22 MR. COOPER: I was just going to ask if
23 Juror No. 7 in the sequence fails to show up that
24 morning, will there be --

25 THE COURT: I don't think we'll have a gap.

1 MR. COOPER: Because there was gaps.

2 THE COURT: I know there was gaps. And
3 neither Ms. Wild nor I can explain why that was the
4 case. And we'll try to find out. But that's my
5 memory, too. And she says, I know what you're going
6 to ask me, and I don't have an answer for you. So I
7 quit asking.

8 MR. COOPER: Great, thank you.

9 THE COURT: Because I'm not going to get an
10 answer.

11 MR. COOPER: I understand.

12 THE COURT: I asked three times, and that's
13 my limit.

14 We received a letter from Mr. Fallick about
15 tomorrow. Everybody saw the letter. All right.
16 It's a letter saying that Mr. Lucero is going to show
17 up. He's agreed to meet with counsel for the
18 Government. He didn't get statutory immunity, and
19 but he's going to meet with them anyway. So
20 Mr. Fallick is not going to be here. And it seems
21 that if Mr. Lucero has agreed to testify without any
22 immunity, then that's not what Mr. Fallick advised
23 him to do. And so Mr. Fallick doesn't see any reason
24 for him to be here. He's got oral surgery tomorrow
25 anyway, so unless somebody thinks something needs to

1 be done, I'll have Ms. Bevel file this motion, and
2 we'll see Mr. Lucero tomorrow without Mr. Fallick
3 here.

4 MR. CASTLE: Anytime a lawyer's mouth is in
5 surgery, Your Honor, it's probably a good thing.

6 THE COURT: All right. I think we were
7 about to have rebuttal from the defendant on the
8 motion to bifurcate. So Mr. Castle, do you have
9 anything further you want to say?

10 MR. CASTLE: Your Honor, the defense
11 attorneys talked at the break. And we're not aware
12 of any lay witness that is a spillover witness
13 between Counts 4 and 5 and the other counts. There
14 might be a couple of FBI agents, I think. The
15 Government has been given authority in the trial --
16 I'm not sure whether they've got authority in this
17 trial yet, but I know they got authority from the
18 Court in Trial 1 to call Agent Acee multiple times so
19 that he could talk about a particular crime base,
20 then move on, and then come back later. So that that
21 works fine. I don't see that it would be a problem.
22 So I'm not sure what they're talking about as far as
23 the spillover witnesses that might cause problems.
24 Because the witnesses that we believe are the lay
25 witnesses for Counts 4 and 5 are completely different

1 individuals. So that's the only thing I would add.

2 THE COURT: Okay. Thank you, Mr. Castle.

3 Anyone else? Ms. Torracco?

4 Well, I'll continue to give it some
5 thought, but I'm inclined to deny the motion. I
6 could be wrong, but I just don't think that the
7 evidence that the defendants are trying so hard to
8 separate themselves from, the pictures of Mr. Burns,
9 are any more prejudicial, and I don't think they're
10 unfairly prejudicial, and there has been other
11 evidence that is going to be seen in the case.

12 I think the next motion was Mr. Davidson's
13 motion, so I think we've taken care of that one.

14 So the next one is what I think is on my
15 tab -- and I think Ms. Wild shared with you her
16 batting order -- it's number 39, which I think is the
17 Government's motion in limine to keep out the
18 magistrate judge's finding of no probable cause. Mr.
19 Beck, Mr. Castellano, Ms. Armijo, who is arguing this
20 motion?

21 MS. ARMIJO: May we have a moment, Your
22 Honor?

23 THE COURT: You may.

24 MS. ARMIJO: Mr. Castellano is the lucky
25 person.

1 MR. CASTELLANO: The Court has reviewed the
2 motion. We think that the finding by the state
3 magistrate judge is not relevant to these
4 proceedings. It doesn't address any of the elements
5 of the offense.

6 THE COURT: Well, you would probably agree
7 with me that, given the low bar that there is for
8 401, that it's probably relevant. I mean, it's
9 got -- it meets the low bar. I guess the question
10 that I have is whether we ought to have anybody
11 coming into this court and saying somebody made a
12 determination that there was probable cause or not
13 probable cause in a case.

14 I mean, we're going to have to tell the
15 jury to some degree that, you know, that there is an
16 indictment in this case. But we're not going to let
17 the Government sit here and with each defendant say:
18 This defendant has already been found to be --
19 probable cause by a Grand Jury, or other witnesses
20 that come in, we're not going to talk a great deal
21 about what other people find. I've always tended to
22 keep out judges and administrative agencies, and
23 things like that, because it seems to me the jury
24 ought to be the one sitting there and listening to
25 the evidence; not sit there and think: Well, a Judge

1 found there was no probable cause, or finds that
2 there was probable cause. That's not what we want
3 these jurors to be doing.

4 But it seems to me, at least on the 401, it
5 probably meets the very low threshold for being
6 relevant. It's just not probably a good idea to
7 start having them thinking about a magistrate judge
8 somewhere making a no probable cause determination.
9 And you're going to sit there and say: Well, they
10 didn't have this evidence. You're going to say,
11 Well, you had that evidence. And then we start
12 trying a magistrate judge's finding of probable
13 cause. So I guess I was inclined to grant the
14 motion. But I'm not sure I can quite spit out that
15 it's not relevant.

16 MR. CASTELLANO: And I would ask the Court
17 to grant the motion, obviously. I think it invades
18 the province of the jury. I think it creates a trial
19 within the trial.

20 THE COURT: Well, that's what the defense
21 lawyers want to do, they want to invade the province
22 of the jury. They want to tell the jury what to do.

23 MR. CASTELLANO: That's what I'm thinking.
24 I think that's right. What does the jury do with a
25 magistrate judge's decision regarding probable cause?

1 What does the jury know about those proceedings, what
2 witnesses or evidence was presented? And those are
3 things that the jury will have to speculate about
4 because no one is going to be there to tell them
5 about what happened there, and why the judge ruled
6 the way he did. So it really does insert collateral
7 matters. And it causes jury confusion and a waste of
8 time. So I think even if it's remotely relevant
9 under 401, I think 403 keeps it out, because now the
10 jury is being asked to rely on what another judge has
11 done.

12 And, of course, as the Court knows, the
13 investigation continued even after the finding of no
14 probable cause. Even the State Police reports
15 indicate other work that they did following that,
16 including some statements that came up, and other
17 things that certainly were more relevant.

18 And the defense points to kind of this --
19 kind of -- I don't know if I'd call it a tug of war,
20 or punting the case back and forth between district
21 attorney's offices, and so there is another part of
22 the deliberative process that happened with the two
23 different district attorney's offices. And I don't
24 know what evidence they could present related to
25 those deliberations by each of those offices.

1 So I think, when we start getting into
2 these collateral matters, we're going to have just
3 explanations for why things went the way they did, as
4 this investigation progressed.

5 And in terms of relevance, I don't know
6 what it is relevant to, or what element it might
7 address. That's the other question. Because this
8 evidence may have been weak at one point, but it's
9 gotten stronger since, once again, doesn't help the
10 jury. Because, as the Court noted, all we're going
11 to say is: That's what they had then and this is
12 what we have now, so don't worry about what happened
13 with the magistrate judge, and don't worry about what
14 you don't know about, because there is no indication
15 of what happened during those proceedings. So at
16 that point it just causes speculation and waste of
17 time. So I think, even if 401 covered it, I think
18 403 keeps it out.

19 THE COURT: All right. Thank you, Mr.
20 Castellano.

21 MR. CASTELLANO: Thank you, Your Honor.

22 THE COURT: Mr. Benjamin.

23 MR. BENJAMIN: Your Honor, I don't think
24 that the issues the Government is attempting to
25 create with this order apply. What the no probable

1 cause order -- as I said in my response, is my
2 attempt to create a substitute for testimony that was
3 destroyed. And I think that the no probable cause
4 order is the only, and probably the strongest way to
5 address that.

6 I think two officers -- I attached to the
7 response an email from the district attorney talking
8 about preparing the pathologist to testify. I think
9 it flies in the face of reason to assume that this
10 wasn't a robust hearing. And to then assume that we
11 don't know what happened doesn't make sense.

12 So I don't have what I believe is probably
13 Giglio material from the officers. I think the
14 officers said something that, quite frankly, flew in
15 the face of the magistrate's experience, or the
16 evidence. And he threw the case. And I think he
17 threw the case, knowing full well that in the State
18 of New Mexico, if the State wanted to, they could
19 come back and file an indictment. So I don't think
20 that this invades the province of the jury. What I
21 think this does is this informs the jury about issues
22 that have been destroyed or not preserved.

23 And also, I think it's very relevant to the
24 continuing argument that I've made, and the Court
25 addressed in its order in 1950. I am going to have

1 to convince a jury that, just because there is a
2 body, somebody should go to jail doesn't apply.
3 That's what I learned I think the first day of my
4 criminal law class in law school. And juries are
5 going to latch on to that. This is a technical idea.
6 And so the technical part of that idea can be
7 explained much better as I articulated in the
8 response: Murder plus one element.

9 And so the jury is going to be forced --
10 and I think this is a way to illustrate to the jury
11 that murder in New Mexico is what was presented and
12 what wasn't there.

13 Now, if they've got these cooperators --
14 which they don't have, they've got Jason Van
15 Veghel -- then that information is what they need to
16 examine to make the next leap to whether this
17 indictment in this case is a basis for a conviction
18 of either conspiracy or the murder of Adrian Burns.
19 And so I am relying on the no probable cause order
20 mainly as a cure for the lack of transcripts to
21 impeach the officers who testified or the
22 pathologist. And I don't have that.

23 I don't think the -- I think Agent Madrid
24 is probably going to be fair game to ask her whether
25 she was -- you know, when she's investigated the

1 case, what progress she's made. I'm going to ask her
2 about the two different district attorneys. And I
3 think she gets to tell me that, no, I believed what
4 it was; they made a decision not to do it; these
5 individuals told me that they had it under control,
6 and this is what is different. That's their
7 presentation. I think I get to counter that, though,
8 with my presentation, which is this is what murder
9 plus the RICO element needs to go. And so they need
10 to be able to draw a distinction. And I think the no
11 probable cause order helps me draw that distinction.

12 I think that, in talking with several
13 people, and somebody smarter than me suggested, I
14 think this is also admissible as an adjudicated fact
15 under judicial notice. The jury can choose to take
16 judicial notice or not notice of this. And I think
17 there is a curative instruction that, if the
18 Government is worried about this coming in and
19 tromping something, the Court could say: This is
20 simply a process in normal procedure. But it can
21 give what is essentially, and what my basis is a
22 curative instruction, because this is the cure for
23 the destruction of the officer's -- as I keep coming
24 back to -- I think what should be disclosed as Giglio
25 testimony. But I can't prove that because I don't

1 have the transcripts.

2 And so the attachments to the motion, I
3 hope lay out that what we're dealing with is a weak
4 murder that then has to rely on, as we heard two
5 weeks ago, the drug debt. And the drug debt has to
6 make this jump in assumption to the murder, and it's
7 part of the RICO elements.

8 THE COURT: Thank you, Mr. Benjamin.
9 Anybody else? Ms. Torraco?

10 MS. TORRACO: Yes, Your Honor.

11 Your Honor, I did file a response to this
12 motion. It's Document 2066. And I filed it just a
13 little bit before noon today, so I apologize to the
14 Court that it wasn't filed earlier.

15 THE COURT: I read it.

16 MS. TORRACO: Wow. Okay.

17 And so I just want to add a little bit to
18 what -- instead of just saying ditto to what Mr.
19 Benjamin just said, I just want to add a little bit.
20 What happened is that when a court -- and I have a
21 bad habit of calling it a no bill, but when the
22 magistrate court decides not to bind over, they
23 destroy those tapes within 90 days. If the
24 magistrate judge binds over, which typically -- it's
25 kind of the joke in state court, because if you're

1 before a magistrate court judge on a serious charge,
2 of course they're going to bind over, because they
3 don't want to be the one that has let the bad guy go.
4 So this was an unusual situation.

5 Nonetheless, if the judge had bound over;
6 found probable cause, bound the case to district
7 court, those tapes are preserved forever. And it
8 typically just is tapes. We don't typically have a
9 court reporter in the magistrate courts, especially
10 in the outlying areas. So there is audiotapes or
11 CDs.

12 Well, clearly, these CDs were not preserved
13 by anyone. We did a request of the district
14 attorney's office. There has been communications
15 with the U.S. Attorney. These tapes -- or even the
16 transcripts have not been preserved at all. So what
17 we have is an issue of lost or destroyed evidence.
18 And it wasn't the police that lost or destroyed the
19 evidence. I tried to cite to some case law, but the
20 fact is it's the courts that lost or destroyed
21 evidence, and it puts everyone in kind of a
22 precarious position.

23 However, there had to be exculpatory
24 evidence that was presented that day. That's common
25 sense. Because, otherwise, there would have been a

1 bind over. So, therefore, the defense has lost
2 valuable testimony because for some reason this
3 magistrate court judge didn't bind over a very
4 serious, very gruesome, really terrifying homicide
5 that happened in that small community. So we've lost
6 evidence. And based on the fact that we have -- that
7 the defense have lost what has to be exculpatory
8 evidence, we should have the right to question about
9 it when the witnesses take the stand: Did you
10 testify at the preliminary hearing in magistrate
11 court? Isn't it true that you said this? I
12 believe -- I have reason to believe that there were
13 other suspects that were mentioned at that particular
14 hearing. There was evidence about that.

15 So regardless of whether or not the actual
16 document comes in -- although I agree with Mr.
17 Benjamin that it should -- but this is an issue that
18 is important to the defense to explore -- maybe
19 explore isn't the right word -- but it's important
20 for the defense to bring out the problems that
21 happened because: Have people changed their mind?
22 Are their memories different than they were back in
23 the day, when there was a no bill? So those are
24 important things to bring out in our defense.

25 And I believe that's all. Thank you.

1 THE COURT: All right. Thank you, Ms.
2 Torraco. Any other defendant want to speak on this
3 motion?

4 All right. Mr. Castellano.

5 MR. CASTELLANO: Just a few points, Your
6 Honor. One is that, really, they're looking for a
7 witness to be a conduit for hearsay because that
8 information from the Court and that document itself
9 are going to be hearsay. And the Court's already
10 ruled under similar circumstances, for example,
11 experts, that the expert can't just be a conduit of
12 hearsay, when he or she testifies about what
13 confidential informants told him. And that's, in
14 essence, what any witness would be; they would be a
15 conduit.

16 And what they're seeking is a substitution
17 for hearsay testimony. They want whatever testimony
18 was presented before the magistrate judge to be
19 summarized by one finding. And that one finding
20 itself can't be a substitute for all the things that
21 were said before the magistrate judge.

22 And the third is that really Mr. Benjamin
23 is seeking a remedy when the Government didn't
24 destroy the evidence. He's saying they should be a
25 substitute for this destroyed evidence. But the

1 Court's already ruled that that evidence wasn't in
2 our possession. And so there is really no remedy for
3 the Court to grant. The Court, in essence, has said
4 there is no remedy because there was no violation.
5 But he, at this point, seems to be seeking a remedy
6 for what happened there.

7 I only heard this from Ms. Armijo, in terms
8 of other problems that are created by introducing
9 this evidence. But apparently, the New Mexico State
10 Police had investigated that judge's wife, and he
11 hated the New Mexico State Police. So, I mean, what
12 happens is we just go back and forth with evidence
13 related to what happened before the magistrate judge,
14 why the magistrate judge may have had a motive not to
15 find probable cause, the fact that the New Mexico
16 State Police had investigated this judge's wife. And
17 all these collateral matters will come out before the
18 jury, when there is no need to do it. It doesn't
19 help the case in any way. It doesn't address any
20 elements. And it just wastes the jury's time, and
21 creates confusion. So I think, given all those
22 reasons, there is just no reason for this evidence to
23 come in.

24 THE COURT: Mr. Benjamin raised this issue
25 of adjudicative fact that the Court could take

1 judicial notice of. I'm not sure that I saw that in
2 the briefing, so it must be new. Any thoughts on it?

3 MR. CASTELLANO: It puts us in the same
4 position we are now. It still injects things before
5 the jury that they shouldn't hear, and that are
6 irrelevant.

7 For example, the jury is going to be
8 instructed on a reasonable doubt standard, and
9 they're going to be hearing about a probable cause
10 standard before a state magistrate judge. What are
11 they going to do with that, and what are they
12 supposed to conclude after they hear a different
13 standard before a different judge in a court, and
14 when they don't know what was presented to that
15 judge? So all it does is cause them to speculate.

16 THE COURT: I think I asked this question
17 the last time we looked at this issue. Is Jim
18 Navarro -- is he an attorney?

19 MR. CASTELLANO: I don't know if he is. I
20 can tell the Court that outside of Albuquerque and
21 Dona Ana County, the only requirement for a
22 magistrate judge is a high school diploma or a GED.
23 So I can talk to the Court generally about
24 requirements for state magistrate judges. But I
25 don't know about that judge specifically.

1 THE COURT: I don't see a Jim Navarro in
2 the bar directory.

3 MR. BENJAMIN: N-A-V-A-R-R-O, I believe is
4 the spelling. I'm looking on my directory right now.

5 THE COURT: I see three Navarros. One is
6 in Biloxi, Mississippi. One is in Albuquerque and,
7 then one is -- that's Amanda, that's a woman, and
8 then David William Navarro is in San Antonio, Texas.
9 So is he still on the bench?

10 MR. BENJAMIN: Your Honor, I'm doing things
11 from memory. That's a bad habit. It's Jim Naranjo
12 as in orange, N-A-R-A-N-J-O.

13 THE COURT: Oh, it's Naranjo?

14 MR. BENJAMIN: Yes, Your Honor.

15 THE COURT: Okay. I'm looking at your
16 response. You spell it as Navarro. Do you think
17 it's Naranjo?

18 MR. BENJAMIN: I have an order that says it
19 is Naranjo.

20 MR. BLACKBURN: Judge, almost all of the
21 magistrates in Los Lunas and Belen are not lawyers.

22 MR. LAHANN: Your Honor, I know Mr. Naranjo
23 personally. He was a sheriff's deputy when I first
24 met him in Socorro in '91. He's never been an
25 attorney.

1 THE COURT: There is only one Naranjo
2 that's a member of the bar, and his name is Benny
3 Naranjo.

4 All right. Anything else? Mr. Castellano.

5 MR. CASTELLANO: I'm just not convinced
6 that even judicial notice covers these facts, looking
7 at the rule.

8 THE COURT: Well, I guess the way I'd
9 analyze it is, even if you take judicial notice of a
10 fact, that's a procedural way of getting evidence in.
11 But it still doesn't solve whether it's admissible
12 evidence for some other reason, such as 401, 403, or
13 something like that. So I'm not sure that the
14 judicial notice solves any of the problems that I'm
15 wrestling with.

16 All right. Anything else, Mr. Castellano?

17 MR. CASTELLANO: No, Your Honor.

18 THE COURT: Well, I think I'm going to
19 grant Government's motion to keep it out. I just --
20 I'm not prepared to say that it's not relevant. But
21 do I think it's inadmissible. I think the low bar
22 that 401 puts in probably makes it admissible.
23 That's the reason we're concerned about it. I think
24 it makes it less likely that the Gallegos brothers
25 killed Mr. Burns.

1 But I think that when the jury trusts the
2 judgment of another fact finder instead of forming
3 its own judgment based on the evidence presented, it
4 employs an improper -- and I think what I'm concerned
5 here is they may make it -- defer their decision or
6 not make it for the right reason. Anytime we have
7 charging decisions and things of that nature, we have
8 to be careful, the Supreme Court said, in United
9 States v. Young, that the prosecutor is vouching for
10 the credibility of witnesses in expressing his
11 personal opinion concerning the guilt of the accused
12 poses two dangers. Such comments can convey the
13 impression that evidence not presented to the jury,
14 but known to the prosecutor, supports the charges
15 against the defendant, can thus jeopardize the
16 defendant's right to be tried solely on the basis of
17 the evidence presented to the jury. And the
18 prosecutor's opinion carries with it the imprimatur
19 of the Government, and may induce the jury to trust
20 the Government's judgment rather than its own view of
21 the evidence. I think we get into a similar
22 situation here with what they would be doing with
23 Judge Naranjo's.

24 I said in a case one time that the Court
25 would be concerned that the jury would decide that

1 DeSantis disabled, not upon its own judgment and
2 understanding of the evidence, but on the fact that
3 an ostensibly smart person looked at some evidence,
4 quite possibly evidence that is not presented to the
5 jury, and came to that conclusion. And thus, the
6 danger that the jury will defer to Judge Naranjo's
7 probable cause determination is a danger of unfair
8 prejudice.

9 One thing I'm concerned about is I think
10 we've determined that there is no way for the jury to
11 determine what evidence was presented to Judge
12 Naranjo. So the jury would need to evaluate the
13 resulting probable cause determination in the
14 abstract. And conducting such an evaluation requires
15 knowledge regarding the intricacies of New Mexico
16 criminal practice and procedure and the
17 qualifications of New Mexico magistrate judges. I
18 had to ask questions, I had to be educated about
19 things I didn't know about in New Mexico procedure as
20 a result of this no probable cause determination.
21 And educating the jury on those matters threatens to
22 turn a trial into a law school seminar, which would
23 waste time and potentially confuse the issues.

24 In the briefing there was also some
25 argument of collateral estoppel. That I was, I

1 think, in Mr. Benjamin's response. I don't think
2 collateral estoppel would apply against the United
3 States, because it wasn't a party to the state court
4 proceedings. And I've already determined the United
5 States had no obligation to preserve the evidence
6 presented to June Naranjo.

7 And there is nothing that's been presented
8 that indicates the United States ever possessed that
9 evidence. And even if it did, we'd have to go
10 through the Trombetta situation. But I don't think
11 we've got the basis for doing that. So I'll grant
12 the motion. I'll keep the probable cause
13 determination out.

14 Ms. Torracco.

15 MS. TORRACO: May I ask a question of the
16 Court?

17 THE COURT: You may.

18 MS. TORRACO: I understand that the Court's
19 ruling is that the actual probable cause
20 determination is not admissible. However, the
21 defense is still strapped with the problem that there
22 was testimony, and for some reason that testimony,
23 for whatever reason, didn't rise to the level of a
24 probable cause finding. So it seems to me that we
25 should be able to still talk about the hearing, talk

1 about what these people testified to previously,
2 although we don't have their actual testimony to
3 impeach them, but based on whatever knowledge that we
4 have about what was said, without actually eliciting
5 the actual ultimate finding by the magistrate court
6 judge. And I just would like a clarification,
7 because that seems to help us kind of remedy for the
8 loss.

9 THE COURT: Well, I'm not circumscribing
10 the defendants' ability to impeach any witnesses
11 here.

12 MS. TORRACO: And we can still go into the
13 hearing, then, without bringing out the actual
14 finding? That's what I thought I heard.

15 THE COURT: Well, I guess I don't rule it
16 out. But I guess I don't see how you could impeach
17 somebody with evidence you don't have.

18 MS. TORRACO: I might.

19 THE COURT: How do you impeach -- I guess
20 if you put on the state police officer and say:
21 Didn't you say at the trial such-and-such. You don't
22 have any good faith basis for asking that question,
23 do you? Unless you've got something I don't know
24 about.

25 MS. TORRACO: I'm not necessarily

1 suggesting that it's impeachment.

2 THE COURT: Okay.

3 MS. TORRACO: But I'm just asking: Can we
4 go into any evidence that might have come out at the
5 hearing because there is people that are a part of
6 trial who were at the hearing, and there is witnesses
7 that are going to be called who were at the hearing.
8 So can we bring out evidence that -- things that
9 occurred at the hearing, and just not bring out
10 ultimate finding?

11 THE COURT: Yeah, I guess so.

12 MS. TORRACO: Okay.

13 THE COURT: I guess in an abstract -- I'm
14 trying to think how you would do that. I once had a
15 case where, like you said, everything was destroyed.
16 And we had to call the magistrate judge, and he had
17 to sit over here and say what occurred. But I can't
18 remember -- I don't remember if it was his ruling or
19 what it was. But we didn't have any evidence of it,
20 so he had to be called. So I guess the answer is
21 yes.

22 MS. TORRACO: Okay. Thank you very much.

23 THE COURT: All right. Okay. That takes
24 care of that motion.

25 I think the next motion is -- I think that

1 was 39; I think the next one is 40. This is the
2 motion in limine to admit the out-of-court statements
3 made by Mr. Burns. I think the statements that he's
4 going to go to Mr. Gallegoses' house and collect --
5 did he say collect money, and then sell heroin? That
6 sounds like 803(3) evidence to me. So I'd be
7 inclined to grant this motion as a then existing
8 state of mind, particularly that it shows his plan.

9 Mr. Castellano, are you going to argue this
10 motion? Ms. Armijo?

11 MS. ARMIJO: Your Honor, I think that's
12 correct. I think it does exactly that. It shows his
13 then existing state of mind. And then he does
14 eventually go to the Gallegoses' house, is what the
15 United States' evidence would show. But we also know
16 that it's verified based on statements that the
17 defendants actually made to police.

18 So we would be seeking it under 803(3).
19 It's also a statement against interests, technically,
20 because he is talking about drug activity that he's
21 going to be doing. So it also would come in under
22 804(b)(3).

23 THE COURT: I'd have to think about that
24 last one, but okay.

25 MS. ARMIJO: I'm just suggesting that it

1 would potentially come in under two different
2 theories, Your Honor.

3 THE COURT: Okay.

4 MS. ARMIJO: Thank you.

5 THE COURT: All right. Thank you, Ms.
6 Armijo.

7 Mr. Benjamin, I think you filed the
8 response that I read, or was it Ms. Torraco?

9 MR. BENJAMIN: I think it was Ms. Torraco.

10 THE COURT: Either one of you. Do you want
11 to go first?

12 MS. TORRACO: Mr. Benjamin will go first.

13 MR. BENJAMIN: Your Honor, I don't see that
14 it's a then existing state of mind, because the time
15 that's outlined allows several other possibilities.
16 And the defendants, I believe, will present -- or at
17 least Joe Gallegos -- will present that that timeline
18 is not as concrete as the Government expects it to
19 be. And so --

20 THE COURT: What's not as concrete? His
21 statement?

22 MR. BENJAMIN: Well, no. And I'll be
23 honest, Your Honor, in that motion in limine, I think
24 it was more of a narrative than an actual statement.
25 So that would be my first request, if there was an

1 actual statement, other than kind of the idea that he
2 was going to Joe's house to collect. Because that
3 doesn't necessarily appear anywhere. So I understand
4 what they're getting at substantively, but I don't
5 know what the actual statement that's being admitted.

6 THE COURT: Well, I thought -- let's see, I
7 thought it was Amber Sutton's -- they said they had a
8 statement from her, that that's what he said. Now, I
9 don't have any 302s or anything attached to either
10 the motion or the response. So I'm just relying upon
11 the assertions in the motion.

12 MR. BENJAMIN: It's been a generalized idea
13 is my problem, Your Honor.

14 THE COURT: Okay.

15 MR. BENJAMIN: Does the Court understand
16 what I'm getting at? I mean, it's during the course
17 of the investigation, you heard multiple times pop up
18 that Burns was going over there to collect money.
19 But it just doesn't ever seem to actually materialize
20 as: This is what he told me, which would be my
21 first -- and I think their first hurdle that they
22 have to cross, is to proffer an actual statement.

23 The second, and I think more important
24 issue, is the Government is reaching to get in
25 evidence that it has better modes of getting in.

1 There is a witness, Daniel Orndorf, Sleepy, who is
2 going to say that Burns was over there. The Court's
3 already ruled on Mr. Joe Gallegos' statement; that's
4 going to come in to say that he was over there. And
5 so I think it's more prejudicial than probative to
6 admit an idea than an actual statement.

7 THE COURT: All right. I understand the
8 distinction. I'll probe with the Government and see
9 if there is a statement here.

10 MR. BENJAMIN: Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Benjamin.

12 Ms. Torraco, you did file the response?

13 MS. TORRACO: Yes, I did, Your Honor. And
14 I'll be brief.

15 Mr. Benjamin and I did discuss at length
16 the fact that we couldn't really identify a
17 statement. There is a narrative in there.

18 THE COURT: Not any 302s or anything?

19 MS. TORRACO: No. And I think that what we
20 have been offered is the gist of it, which is that he
21 said that he stated that he was going to go over to
22 the Gallegos home, and that they had owed him money.

23 I also want to bring to the Court's
24 attention that at the motion hearing on March 14, the
25 Government also at that point represented that they

1 were going to admit other statements from Adrian
2 Burns, what he had told Dan Orndorf about the
3 Gallegos -- I'm not really sure if it was Joe or Joe
4 and Andrew, or if it was the Gallegos brothers, but
5 that they had owed him money. Adrian Burns told Dan
6 Orndorf, paragraph 10 of my motion, that the
7 Gallegos -- someone in the Gallegos family owed them
8 money, and that Dan Orndorf shouldn't do business
9 with him anymore. And that was a representation at
10 the motion hearing on March 14.

11 The problem that I have with the exception
12 of the then existing mental statement is, first of
13 all, it has to first -- all of the hearsay exceptions
14 have to first cross the threshold of are they
15 reliable?

16 THE COURT: Let me do this -- I don't want
17 to rush you and I want to hear what you have to say.
18 Why don't we shut her down for today. That way I
19 won't rush you this evening, and give the Government
20 an opportunity to respond.

21 MS. TORRACO: Thank you.

22 THE COURT: Tomorrow we need to find some
23 time -- Ms. Armijo I think reminded me I didn't
24 finish the pretrial conference. There are a few
25 things. One of the things I need to ask you about

1 tomorrow, for some reason I didn't ask how long your
2 closings were going to last. So you can be thinking
3 about that overnight, so I can kind of begin to
4 schedule that.

5 I also am not sure that I have -- we have
6 talked about a statement of the case, and I just
7 thumbed through the materials, so I don't think there
8 is a statement of the case. So it may be that we
9 need to have y'all prepare one, if you haven't
10 prepared one. I usually put the burden on the
11 Government. Remember, don't kill yourselves on this.
12 It's just simply to get them talking about if they
13 know anything about this case, so we don't have to
14 state every position in it. But anyway, we'll need
15 to find some time to do that.

16 Here is the notebook that Jury Services has
17 gotten. Is that a winner, Ms. Armijo?

18 MS. ARMIJO: Yes, Your Honor.

19 MS. HARBOUR-VALDEZ: Yes, Your Honor.

20 THE COURT: Everybody comfortable with it?
21 So we'll order 18 of those. Maybe a few extra, if
22 they're big notetakers.

23 MS. ARMIJO: I would say probably add some
24 extras.

25 THE COURT: All right. I'll do that. And

1 they can get more pages in there if you like a bigger
2 one.

3 All right. Y'all have a good evening.
4 We'll see y'all tomorrow. Appreciate your hard work.

5 (The Court stood in recess.)
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UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

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Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on April 12, 2018.



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